

**Exhibit F**

IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI

In Re: ) Case No. 25-40976  
23ANDME HOLDING CO., et al. ) St. Louis, Missouri  
Debtors. ) June 20, 2025  
9:03 AM

TRANSCRIPT OF HEARING RE:  
SALE HEARING

DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING BIDDING  
PROCEDURES FOR THE SALE OF THE DEBTORS ASSETS, (II) SCHEDULING  
CERTAIN DATES AND DEADLINES WITH RESPECT THERETO, (III)  
APPROVING THE FORM AND MANNER OF THE NOTICE THEREOF, (IV)  
APPROVING PROCEDURES REGARDING ENTRY INTO STALKING HORSE  
AGREEMENT(S), IF ANY, (V) ESTABLISHING NOTICE AND PROCEDURES  
FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES,  
(VI) AUTHORIZING THE SALE OF THE DEBTORS ASSETS FREE AND CLEAR  
OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES, (VII) APPROVING  
PROCEDURES FOR THE SALE, TRANSFER, OR ABANDONMENT OF DE  
MINIMIS ASSETS, AND (VIII) GRANTING RELATED RELIEF. FILED BY  
DEBTOR 23ANDME HOLDING CO. (RISKE, THOMAS) (30)  
NOTICE OF (I) POTENTIAL ASSUMPTION AND ASSIGNMENT OF CERTAIN  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (II) PROPOSED  
CURE AMOUNTS (RISKE, THOMAS) (591)  
BEFORE THE HONORABLE BRIAN C. WALSH  
UNITED STATES BANKRUPTCY COURT

ECRO

Kim Reitz

Transcription Services:

eScribers, LLC  
7227 N. 16th Avenue  
Suite #207  
Phoenix, AZ 85020  
(800) 257-0885

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.  
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE



1 APPEARANCES:

2 For the Debtors:

THOMAS H. RISKE, ESQ.  
CARMODY MACDONALD P.C.  
120 South Central Avenue  
Suite 1800  
St. Louis, MO 63105

5

PAUL M. BASTA, ESQ.  
WILLIAM A. CLAREMAN, ESQ.  
CHRISTOPHER HOPKINS, ESQ.  
JEFFREY J. RECHER, ESQ.  
PAUL, WEISS, RIFKIND,  
WHARTON & GARRISON LLP  
1285 Avenue of the  
Americas  
New York, NY 10019

9

10 For TTAM Research Institute:

DAVID M. UNSETH, ESQ.  
BRYAN CAVE LEIGHTON  
PAISNER LLP  
211 North Broadway  
Suite 3600  
St. Louis, MO 63102

11

12

13

14

SUSHEEL KIRPALANI, ESQ.  
QUINN EMANUEL URQUHART &  
SULLIVAN LLP  
295 5th Avenue  
9th Floor  
New York, NY 10016

15

16

17

JOSEPH O. LARKIN, ESQ.  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
920 North King Street  
Wilmington, DE 12801

18

19

20 For State of Texas:

ROMA N. DESAI, AAG  
LAYLA D. MILLIGAN, AAG  
MONICA WADLEIGH, AAG  
TEXAS OFFICE OF THE  
ATTORNEY GENERAL  
PO Box 12548  
Austin, TX 78711

21

22

23

24

25



1 For JMB Capital Partners Lending, JOSHUA WATTS, ESQ.  
2 LLC: NORTON ROSE FULBRIGHT US  
3 LLP  
4 7676 Forsyth Boulevard  
Suite 2230  
St. Louis, MO 63105

5 JAMES A. COPELAND, ESQ.  
6 ROBERT M. HIRSH, ESQ. (VIA  
WEBEX)  
7 NORTON ROSE FULBRIGHT US  
LLP  
8 1301 Avenue of the  
Americas  
9 New York, NY 10019

10 For NAAG Client States: ABIGAIL R. RYAN, ESQ.  
11 NATIONAL ASSOCIATION OF  
ATTORNEYS GENERAL  
12 1850 M Street, Northwest  
12th Floor  
Washington, DC 20036

13 For Data Breach Class Action NORMAN SIEGEL, ESQ.  
14 Plaintiffs: STUEVE SIEGEL HANSON LLP  
460 Nichols Road  
Suite 200  
15 Kansas City, MO 64112

16 CARI CAMPEN LAUFENBERG,  
17 ESQ. (VIA WEBEX)  
KELLER ROHRBACK LLP  
18 1201 3rd Avenue  
Suite 3400  
19 Seattle, WA 98101

20 GAYLE M. BLATT, ESQ. (VIA  
WEBEX)  
21 CASEYGERRY  
110 Laurel Street  
San Diego, CA 92101

22 For State of Minnesota: DALILA Z. JORDAN, AAG  
23 MINNESOTA ATTORNEY  
GENERAL'S OFFICE  
24 445 Minnesota Street  
Suite 1400  
25 St. Paul, MN 55101



1  
2 For Official Committee of MIRANDA SWIFT, ESQ.  
Unsecured Creditors: STINSON LLP  
3 1201 Walnut Street  
Suite 2900  
4 Kansas City, MO 64106  
5 JASON R. ADAMS, ESQ.  
MAEGHAN J. MCLOUGHLIN,  
6 ESQ.  
ERIC R. WILSON, ESQ.  
7 KELLEY DRYE & WARREN LLP  
175 Greenwich Street  
8 New York, NY 10007  
9 For State of Missouri: ALISON ESBECK, ESQ.  
MISSOURI ATTORNEY  
10 GENERAL'S OFFICE  
815 Olive Street  
11 Suite 200  
St. Louis, MO 63101  
12  
13 For State of Tennessee: MARVIN E. CLEMENTS, ESQ.  
TENNESSEE ATTORNEY  
GENERAL'S OFFICE  
14 PO Box 20207  
Nashville, TN 37202  
15  
16 For Oracle America, Inc. SARAH E. TOMLINSON, ESQ.  
SUMMERS COMPTON WELLS  
903 South Lindbergh  
17 Boulevard  
Suite 200  
18 St. Louis, MO 63131  
19 For the People of the State of DANIEL M. NADAL, ESQ.  
California: OFFICE OF THE ATTORNEY  
GENERAL  
20 600 West Broadway  
Suite 1800  
21 San Diego, CA 92101  
22  
23 BERNARD ARDAVAN ESKANDARI,  
ESQ. (VIA WEBEX)  
24 CALIFORNIA DEPARTMENT OF  
JUSTICE  
300 South Spring Street  
25 Suite 1702

1 Los Angeles, CA 90013

2

3 For Regeneron Pharmaceuticals, MICHAEL H. CASSEL, ESQ.  
4 Inc.: WACHTELL, LIPTON, ROSEN &  
5 KATZ  
6 51 West 52nd Street  
7 New York, NY 10019

8 For Ad Hoc Equity Group: SPENCER P. DESAI, ESQ.  
9 THE DESAI LAW FIRM, LLC  
10 13321 North Outer Forty  
11 Road  
12 Suite 300  
13 St. Louis, MO 63017

14 ANDREW M. CARTY, ESQ. (VIA  
15 WEBEX)  
16 SHARON I. DWOSKIN, ESQ.  
17 (VIA WEBEX)  
18 BROWN RUDNICK LLP  
19 7 Times Square  
20 New York, NY 10036

21 For Office of the United States JOSEPH SCHLOTZHAUER, ESQ.  
22 Trustee: U.S. DEPARTMENT OF JUSTICE  
23 111 South 10th Street  
24 Suite 6.353  
25 St. Louis, MO 63102

26 For Neil M. Richards: ROSS E. FIRSENBAUM, ESQ.  
27 ANDREW N. GOLDMAN, ESQ.  
28 (VIA WEBEX)  
29 WILMER CUTLER PICKERING  
30 HALE & DORR LLP  
31 250 Greenwich Street  
32 New York, NY 10007

33 For United States of America: JOSHUA M. JONES, ESQ.  
34 U.S. ATTORNEY'S OFFICE  
35 111 South 10th Street  
36 Suite 20.333  
37 St. Louis, MO 63102

38 For BambuMeta Ventures, LLC: STEVEN M. WALLACE, ESQ.  
39 GOLDENBERG HELLER &  
40 ANTOGNOLI, P.C.  
41 2227 South State Route 157  
42 Edwardsville, IL 62025

1  
2  
3 Local Counsel to Special Board of Directors: LAWRENCE E. PARRES, ESQ.  
4 LEWIS RICE LLC  
5 600 Washington Avenue  
6 Suite 2500  
7 St. Louis, MO 63101  
8  
9 For Intellectual Property, Health STEVEN T. WATERMAN, ESQ.  
10 Law, and Bioethics Scholars: (VIA WEBEX)  
11 DORSEY & WHITNEY LLP  
12 111 South Main Street  
13 Suite 2100  
14 Salt Lake City, UT 84111  
15  
16 For State of Alaska: J. PAIGE SMOTHERS, ESQ.  
17 (VIA WEBEX)  
18 ALASKA DEPARTMENT OF LAW  
19 1031 West 4th Avenue  
20 Suite 200  
21 Anchorage, AK 99501  
22  
23 For State of Oregon: JUSTIN D. LEONARD, AAG  
24 (VIA WEBEX)  
25 OREGON DEPARTMENT OF  
JUSTICE  
1162 Court Street,  
Northeast  
Salem, OR 97301  
  
For U.S. Department of Justice, SETH B. SHAPIRO, ESQ. (VIA  
National Security Division and WEBEX)  
United States Postal Service: U.S. DEPARTMENT OF  
JUSTICE-CIVIL DIVISION  
1100 L Street, Northwest  
Room 10012  
Washington, DC 20005  
  
For State of Delaware: SHELLEY A. KINSELLA, ESQ.  
(VIA WEBEX)  
BRIAN CANFIELD, ESQ. (VIA  
WEBEX)  
DELAWARE DEPARTMENT OF  
JUSTICE  
820 North French Street  
Wilmington, DE 19801

1

2

For the State of Utah:

3

DOUGLAS J. CRAPO, ESQ.

(VIA WEBEX)

4

UTAH OFFICE OF THE

ATTORNEY GENERAL

5

160 East 300 South

Fifth Floor

6

Salt Lake City, UT 84114

7

For Commonwealth of Kentucky:

CHRISTOPHER HUNT, ESQ.

(VIA WEBEX)

8

KY OFFICE OF ATTORNEY

GENERAL

9

1024 Capital Center Drive

Suite 200

10

Frankfort, KY 40601

11

For Commonwealth of Pennsylvania:

LAUREN A. MICHAELS, ESQ.

(VIA WEBEX)

12

PA OFFICE OF ATTORNEY

GENERAL

13

1251 Waterfront Place

Mezzanine Level

14

Pittsburgh, PA 15222

15

For State of New York:

CLARK RUSSELL, ESQ. (VIA

WEBEX)

16

OFFICE OF THE NEW YORK

STATE ATTORNEY GENERAL

17

The Capitol

Albany, NY 12224

18

For Various Amici Curiae:

JOHN TALBOT "TAL" SANT,  
JR., ESQ.

19

BECK & SANT, LLC

20

11775 Borman Drive

Suite 216

21

Maryland Heights, MO 63146

22

Also Present:

Anne Wojcicki

TTAM Research Institute

23

Andrew Swift

24

Moelis & Company

25

Peter Lefkowitz

Debtors' Interim Data



1 Privacy Officer

2

3 Also Present (Cont'd): Prof. Fred H. Cate  
University of Indiana

4 Thomas Walper  
Debtors' Special Committee

5 Charles Viscito  
Class A Equity Shareholder

6

7 Kevin Barnes  
Class A Shareholder

8

9 Anie Chang  
Class A Shareholder

10 Javier Luraschi  
Individual Investor

11 Elizabeth Eichele  
Pro Se, Customer of Debtor

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Colloquy

1 THE CLERK: 23andMe Holding Co., et al.

2 THE COURT: This is a continuation of our hearing  
3 from the other day, so if you entered your appearance on  
4 Wednesday, I don't think you need to do it again. If there's  
5 anybody newly entering an appearance in the courtroom, please  
6 feel free.

7 MR. SANT: Good morning, Your Honor. Tal Sant, on  
8 behalf of various amici curiae listed in exhibit A to the  
9 brief and motion we filed at docket 807, including Linda  
10 MacDonald Glenn, and a long list of names. I won't read all  
11 of them.

12 THE COURT: All right. Thank you, Mr. Sant.

13 MR. SANT: Thank you.

14 THE COURT: Anyone else in the courtroom? New  
15 appearances.

16 Anyone on the Webex with a new appearance?

17 All right. Let's get underway.

18 MR. BARNES: Good morning, Your Honor. Kevin Barnes  
19 (ph.), class A shareholder.

20 THE COURT: Thank you, Mr. Barnes.

21 Please proceed, Mr. Hopkins.

22 MR. HOPKINS: Good morning, Your Honor. For the  
23 record, Chris Hopkins of Paul Weiss as cocounsel to the  
24 debtors.

25 So to start with some updates, pleased to report it

Colloquy

1 was a productive Juneteenth. We are now down to just five  
2 objecting states. It's California, Texas, Kentucky, Tennessee  
3 and Utah. So we want to extend our thanks to the states that  
4 work with us between the end of Wednesday's hearing and this  
5 morning and to TTAM for helping to get those deals across the  
6 finish line.

7 As we told Your Honor on Wednesday, I think we want  
8 to be very efficient today. So unless Your Honor has any  
9 preliminary remarks or prefers otherwise, I would propose to  
10 turn it over to my partner Jeffrey Recher to start with our  
11 first witness today, who's Prof. Fred Cate, on direct.

12 THE COURT: Sure. Ms. Ryan may have a clarification.

13 MS. RYAN: Sorry, guys.

14 MR. HOPKINS: Oh, sure.

15 MS. RYAN: I do this to you all the time. Sorry, Mr.  
16 Hopkins.

17 So while we have come and made a lot of work, it was  
18 a successful Juneteenth, the NAAG states are going to stand on  
19 their pleadings. And to the extent that you overrule the next  
20 state standing objection, we ask that it only be overruled as  
21 to TTAM and that it stays in abatement as to Regeneron until  
22 the TTAM sale closes and is final. So if we have to come back  
23 here, we already have a live objection.

24 THE COURT: So that is a question that I had. The  
25 states are taking a different position with respect to TTAM

Colloquy

1 than they are with respect to Regeneron. I don't know that we  
2 need to figure that out at the beginning of today's hearing,  
3 but we probably need to figure out before the hearing wraps up  
4 how we're going to handle that.

5 MR. HOPKINS: Your Honor, I can actually clarify  
6 that.

7 THE COURT: Okay. Okay.

8 MR. HOPKINS: As part of the progress we've made with  
9 the states, what we, as the debtors have agreed to do is to  
10 modify the sale order. It was originally contemplated that  
11 we'd be asking Your Honor to approve both the winning bid and  
12 backup bid. The way the sale order has been revised is if  
13 Your Honor approves the sale order today, it will only be  
14 authorizing the debtors to execute the winning bid to TTAM.  
15 We don't expect anything to happen. But if it were and we  
16 were to need to pivot to the backup bid, we would have to come  
17 back to Your Honor for a separate hearing to get authorization  
18 to execute on the backup.

19 THE COURT: Okay. Well, that seems to sync well with  
20 the way the states are approaching things. So I think we'll  
21 keep that in mind. That's very helpful.

22 MS. RYAN: And if I may, if now is the time, Your  
23 Honor, or if you want me to address this later, the states do  
24 want to move their exhibits into evidence. And I believe  
25 there's only one group of exhibits that have objections. And

Colloquy

1 so I can do that now, or I can wait until it's a better time  
2 for Your Honor.

3 THE COURT: I'm trying to recall if I know what  
4 your -- do you have an exhibit binder or --

5 MS. RYAN: I do. I do. I have extra binders, and I  
6 can bring them to you right now.

7 MR. HOPKINS: Your Honor, if I could suggest, I  
8 believe the way we'd like to proceed today, again, if it's  
9 okay with Your Honor, is that we finish our evidence and then  
10 we can get to all of the evidence of the other states so --

11 THE COURT: Okay. I think that makes sense --

12 MR. HOPKINS: -- the objecting states, as well as  
13 Matt (ph.).

14 THE COURT: -- particularly if there are objections,  
15 maybe in the -- maybe in the interim.

16 MR. HOPKINS: That was not intentional, Your Honor.

17 THE COURT: That's an old trick. Come on.

18 MR. RECHER: It's like a gavel bang, Your Honor.

19 THE COURT: Yeah. Ms. Ryan, why don't we wait till  
20 we get into the states -- you're welcome to leave him there,  
21 but why don't we wait until we get into the other states'  
22 objections, and we'll deal with exhibits at that point? And  
23 like I said, maybe objections will get worked out between now  
24 and then as well.

25 MR. HOPKINS: Sure.



Colloquy

1 THE COURT: Okay. All right.

2 MS. RYAN: That's a good plan. Thank you.

3 THE COURT: All right. Anything else before we  
4 begin? Or resume.

5 MR. HOPKINS: Not from the debtors, Your Honor.

6 THE COURT: Before we resume.

7 MR. HOPKINS: Before we resume.

8 THE COURT: Okay. Please proceed.

9 MR. HOPKINS: All right. Thank you, Your Honor.  
10 I'll cede the podium to my partner Jeff Recher.

11 THE COURT: Good morning.

12 MS. CHANG: Hi. Good morning. Good morning, Your  
13 Honor. Sorry. Sorry to interrupt. I had myself on mute  
14 earlier. I was trying to enter an appearance. Is that okay?

15 THE COURT: Sure. Go ahead.

16 MS. CHANG: Angie Chang, a shareholder.

17 THE COURT: Okay. Thank you.

18 MS. CHANG: Thank you. Sorry about --

19 THE COURT: Okay. Mr. Recher.

20 MR. RECHER: All right. Good morning, Your Honor,  
21 and for the record, Jeff Recher from Paul Weiss on behalf of  
22 the debtors. And as Mr. Hopkins mentioned, we would like to  
23 begin this morning by calling Prof. Fred Cate from the  
24 University of Indiana.

25 THE COURT: All right. Prof. Cate, would you come

Colloquy

1 forward, please?

2 Yes. Yes. And the nonparties will be headed to the  
3 breakout room.

4 MR. RECHER: And Your Honor, as everyone in the  
5 courtroom heard, we do have a couple of binders to assist in  
6 the direct examination of Prof. Cate. If I could, I'm happy  
7 to approach and hand some to you or your law clerks, as well  
8 as to the other interested parties.

9 THE COURT: I think we have your --

10 THE CLERK: I gave you the debtors' binder.

11 THE COURT: Yes. Yes, I think we have the debtors'  
12 binders, so I think we're --

13 MR. RECHER: These are, I think, a binder for Prof.  
14 Cate's direct testimony.

15 THE COURT: Well, maybe we ought to take them in  
16 that -- okay.

17 MR. RECHER: All right.

18 THE COURT: We'll take you up on that. Thank you.

19 THE CLERK: Mr. Cate, would you please stand and  
20 raise your right hand? Please state your name for the record.

21 (Witness sworn)

22 THE CLERK: Thank you. You can sit. Please speak  
23 directly into the microphone.

24 DIRECT EXAMINATION

25 BY MR. RECHER:



Fred Cate - Direct

1 Q. Good morning, Prof. Cate.

2 A. Good morning.

3 Q. What's your full name, sir?

4 A. Fred Harrison Cate.

5 Q. And briefly, could you describe for us your educational  
6 background?

7 A. Yes. I received my AB with honors and my law degree from  
8 Stanford University.

9 Q. Okay. And are you currently employed by Indiana  
10 University?

11 A. I am.

12 Q. And what position or positions do you hold at Indiana  
13 University?

14 A. I'm a distinguished professor and C. Ben Dutton Professor  
15 of Law. I'm an adjunct professor of informatics and  
16 computing. And I'm a senior fellow of the Center for Applied  
17 Cybersecurity Research, which I founded.

18 Q. What are the principal subjects of your academic research  
19 and scholarship?

20 A. Privacy, security, health privacy, and international or  
21 global privacy.

22 Q. And have you published any articles on the subject of  
23 privacy or privacy law?

24 A. I have published hundreds of articles on those subjects.  
25 And I founded the Oxford University Press Journal



Fred Cate - Direct

1 International Data Privacy Law. And I served as privacy  
2 editor for the IEEE, which is the reference standard  
3 organization for computer science. As privacy editor for the  
4 IEEE Journal, I have written extensively. Yeah.

5 Q. And have you served in any other positions you haven't  
6 already mentioned relating to privacy or privacy law?

7 A. Many other positions. So I am the cofounder of a -- of a  
8 strategic consulting company Red Barn Strategy. I am the  
9 executive director of the International Accountability of the  
10 Information Accountability Foundation, which has been around  
11 for twenty years dealing with privacy policy globally. I've  
12 served on a number of U.S. government committees, including  
13 the Privacy Oversight Board of the National Security Agency.  
14 I've served on a number of academic and other committees and  
15 task forces, including being vice chair of the ABA Health Law  
16 Section on Privacy & Security.

17 Q. Have you served as an expert witness before?

18 A. I have.

19 Q. Approximately how many times?

20 A. Eighteen times.

21 Q. And in any of those cases, were you an expert or  
22 qualified as an expert on the subject of privacy or privacy  
23 law?

24 A. In all of those cases.

25 Q. Okay. Have you ever been excluded by a court with

Fred Cate - Direct

1 respect to your opinions as to privacy?

2 A. I have never been excluded by a court.

3 Q. Okay. Have you previously been appointed a consumer  
4 privacy ombudsman?

5 A. I have.

6 Q. How many times?

7 A. Four times.

8 Q. And before how many different courts?

9 A. Courts in Missouri, Indiana, and Kentucky, so three.

10 Q. And in this case, what were you asked to do by the  
11 debtors?

12 A. I was asked to review the CPO's privacy report and to  
13 analyze its conclusions and -- and analysis.

14 Q. And did you do that?

15 A. I did.

16 Q. And are the opinions you reached set forth in your  
17 declaration, which is in evidence at docket 772?

18 A. Yes, they are.

19 Q. So you mentioned a moment ago that you've served as a CPO  
20 in other cases. Did the debtors in those other cases have  
21 privacy policies in place as of the petition date?

22 A. They did.

23 Q. And did any of those privacy policies with respect to any  
24 of those debtors, where you served as a CPO, prohibit the  
25 transfer of personally identifiable information?

Fred Cate - Direct

1 A. They did not.

2 Q. And in those circumstances, did you have occasion in  
3 those other cases to consider or analyze whether the transfer  
4 of personally identifiable information as part of a Section  
5 363 sale violated nonbankruptcy law?

6 A. I did not.

7 Q. Why not?

8 A. Under the Bankruptcy Code Section 363, it's pretty clear  
9 you don't get to the question of nonbankruptcy law unless you  
10 find that --

11 MS. MILLIGAN: Objection.

12 A. -- there was a prohibition.

13 MS. MILLIGAN: Objection. The witness is opining on  
14 the meaning of the law.

15 THE COURT: I'll allow counsel some leeway, subject  
16 to the discussion we had on Wednesday about the appropriate  
17 scope of Prof. Cate's opinions. I'll take them for what  
18 they're worth.

19 MS. MILLIGAN: Thank you, Your Honor.

20 Q. So Prof. Cate, and again, as we said the other day when  
21 we were talking about your declaration, the debtors aren't  
22 offering your testimony as evidence about what the law is or  
23 how the Court should construe the law. But based on your  
24 experience, in what circumstances would a CPO need to consider  
25 or apply nonbankruptcy law in a 363 sale?

Fred Cate - Direct

1 A. Well, 363 sets out what you might think of as a -- as  
2 a -- as a three-option approach to dealing with privacy  
3 issues. And one of them is where there is no prohibition on a  
4 sale that has been disclosed to a -- that has been disclosed  
5 to a consumer and the sale is to a third-party. And in that  
6 case, there's no consideration under the statute, as stated,  
7 of -- of nonbankruptcy law.

8 And then the second tier under 363(b)(1) is if there  
9 is -- is such a prohibition, but the court concludes that  
10 there is not -- that otherwise it's consistent with the  
11 privacy policy or in this case, that prohibition would not  
12 apply, in which case there's no consideration required.

13 And then the third situation is where neither of those is  
14 met. So there must be a prohibition, and the prohibition must  
15 actually apply. There's nothing in which case then explicitly  
16 under the law nonbankruptcy law may be considered.

17 Q. And in those other cases you mentioned, where you were  
18 appointed as and served as a CPO and where the policies of the  
19 debtor as of the petition date didn't prohibit the transfer of  
20 PII, did the court or any other interested party in those  
21 cases ever suggest to you that you should be looking to  
22 nonbankruptcy law?

23 A. No.

24 Q. So let's start then with the debtors' policies. And did  
25 you review the CPO report in this case?

Fred Cate - Direct

1 A. In detail.

2 Q. All right. And did you see the CPO's conclusion, or I  
3 should say opinion that he "cannot conclude with certainty  
4 that the sale of the company's data in bankruptcy is otherwise  
5 consistent with its privacy policies"; did you see that  
6 opinion?

7 A. I did.

8 Q. And did you also see that he went on to say that that was  
9 particularly the case, particularly the case, meaning he  
10 cannot conclude, for those customers who created their  
11 accounts before the 23andMe privacy statement was amended in  
12 June of 2022 to expressly note the potential for the sale of  
13 consumer data in bankruptcy? Did you see that discussion in  
14 his report?

15 A. I did.

16 Q. Okay. And what did you make of that opinion in the CPO  
17 report?

18 A. First of all, it was surprising to me that there was no  
19 conclusion, since under 363, everything turns on this. In  
20 other words, if there is -- if the -- if the CPO is not  
21 advising the judge, the court, to find that there was a  
22 prohibition on sale to third parties disclosed to consumers as  
23 of the time of the commission of the proceeding, then there's  
24 no further inquiry necessary. Of course, you can have further  
25 inquiry, but the law does not require any further inquiry,

Fred Cate - Direct

1 including further inquiry into nonbankruptcy law's  
2 applicability.

3 The second observation or reaction I had to that set of  
4 conclusions or assertions or lack of conclusion was the  
5 suggestion that, rather than just look at bankruptcy policy,  
6 which is what the -- at the policy, what we would call a  
7 privacy policy of an organization that instead the CPO wanted  
8 to look at the -- a broader range of -- of statements,  
9 potentially oral statements, written statements, marketing  
10 material, what have you, and it's something that's unusual.  
11 It's unique in my experience.

12 Q. Okay. And I do want to ask you about that opinion as  
13 well. Let me ask. Did you yourself and your work in this  
14 case review the debtor's terms of use and privacy statement  
15 that were in effect as of the petition date?

16 A. I did.

17 Q. Okay. And what, if anything, did you conclude as to  
18 whether the debtors' policies prohibited a transfer of PII as  
19 part of a sale or change in control?

20 A. There was no prohibition. In fact, there was an explicit  
21 grant of those rights, an affirmative grant of those rights,  
22 in the policy.

23 Q. And why don't we look at that quickly? If you could turn  
24 to I believe it's tab 4 in your binder. And this is debtors'  
25 Exhibit 3-L. And you've seen this document before?

Fred Cate - Direct

1 A. I have.

2 Q. And was Exhibit 3-L, to your understanding, the privacy  
3 statement in effect as of the petition date?

4 A. Yes.

5 Q. And could you turn, if you would, sir, to the page -- if  
6 you look at the top, there's pagination. Page 123. Excuse  
7 me. I'll give you a new page. Page 130 of 222.

8 A. Right.

9 Q. And there's a section there that is captioned, "Commonly  
10 Owned Entities, Affiliates, and Change of Ownership"; do you  
11 see that?

12 A. I do.

13 Q. And it says, "If we are involved in a bankruptcy, merger,  
14 acquisition, reorganization, or sale of assets, your personal  
15 information may be accessed, sold, or transferred as part of  
16 that transaction, and this privacy statement will apply to  
17 your personal information as transferred to the new entity."  
18 That's the language you reviewed as part of your work in this  
19 case?

20 A. Yes, it is.

21 Q. And was it relevant in any way to the opinions in your  
22 declaration?

23 A. Yes, because it eliminated any claim that the policy, in  
24 effect, as of the date of the proceeding and disclosed to the  
25 public, disclosed to consumers, prohibited the sale of data to

Fred Cate - Direct

1 third parties.

2 Q. And that language, this provision in debtors' Exhibit 3-  
3 L, includes the specific word "bankruptcy"; is that right?

4 A. It does.

5 Q. And I think you mentioned this earlier. The CPO in his  
6 report seems to draw perhaps a distinction between this policy  
7 that included the specific word bankruptcy and the debtors'  
8 historical policies from prior to 2022; you see that?

9 A. Yes.

10 Q. Okay. And in your view, do the debtors' historical  
11 policies, meaning their policies in effect for periods prior  
12 to the petition date, matter in this context?

13 A. They -- they -- they don't matter as a matter of -- of  
14 law. 363 is explicit about what matters.

15 MS. MILLIGAN: Objection, Your Honor. Again, he's  
16 opining about what 363 means and says.

17 THE COURT: Okay. Overruled. You're welcome to  
18 object to preserve the objection. That's fine. I'll allow  
19 it, and take it for what it's worth.

20 A. So 363 is explicit on this. However, a -- you know, a  
21 reasonable person might say, did they just change the policy  
22 as of the last moment, And so I, in fact, went and looked at  
23 all of the prior policies. And all of them preserve the right  
24 and grant explicitly the right to sell data in connection with  
25 a -- with -- with a reorganization or a sale of assets.



Fred Cate - Direct

1 Q. So am I right, then, in understanding that, in your view,  
2 none of the prior policies prohibit the transfer of PII in  
3 connection with a sale or change in control?

4 A. You are correct.

5 Q. Okay. So why don't we take a look at just one of those  
6 historical policies? If you could turn to tab 5 in your  
7 binder, which should be debtors' Exhibit 3-B, as in boy, and  
8 I'll ask if you've seen this document in connection with your  
9 work in this case.

10 A. I have.

11 Q. Okay. And I think this document's in evidence, and I  
12 think it's equally in evidence that this is the debtors'  
13 privacy statement as of June 24th, 2010. Could you turn to  
14 the page -- I believe it's page 29 of -- page 29 of 222.  
15 Should be the last substantive page in the tab.

16 A. Yes, I'm there.

17 Q. Okay. And there's a section there with the heading,  
18 "Business Transitions".

19 A. I see it.

20 Q. All right. And the policy says, "In the event that  
21 23andMe goes through a business transition, such as", and it  
22 goes on. But let me let me stop there. Do you consider a  
23 Chapter 11 proceeding or a bankruptcy to be a business  
24 transition?

25 A. I do.

Fred Cate - Direct

1 Q. And the section goes on and gives some examples of  
2 business transitions, merger, acquisition by another company,  
3 or a sale of all or a portion of its assets, and in those  
4 circumstances, it says, your personal information will likely  
5 be among the assets transferred. What, if any relevance, did  
6 this provision in this historical policy have to the opinions  
7 you expressed in your declaration?

8 A. Well, first, it eliminates the claim that as of this  
9 point in time, there was any assertion of a policy that  
10 prohibited the sale to third parties in connection with the  
11 reorganization or transfer of assets. And second of all, it  
12 provided explicit notice that there would likely be a transfer  
13 of personal data in that case.

14 Q. And in your work in this case, did you see any historical  
15 iteration of the debtors' privacy statement that did not  
16 include this language about business transitions or something  
17 very close to it or the provision we saw just a moment ago in  
18 debtors' Exhibit 3-L?

19 A. I didn't see any policy that did not include that  
20 language or something similar to it.

21 Q. And you touched on this a little bit earlier, but let me  
22 ask you a couple more questions about the CPO's approach to  
23 interpreting what a privacy policy is or might be. And the  
24 CPO says in his report, "The CPO interprets the debtors'  
25 privacy policies broadly to include not just the many versions

Fred Cate - Direct

1 and revisions of the 23andMe privacy statement in terms of  
2 service but also the frequent representations and promises  
3 23andMe made about privacy." You remember that discussion in  
4 the CPO's report?

5 A. I do.

6 Q. All right. And do you have an opinion about whether  
7 that's an appropriate way of analyzing privacy policies as a  
8 CPO or in considering these issues as part of a Section 363  
9 sale?

10 A. I think it is not an appropriate way, and particularly as  
11 here, where you have a stated privacy policy, a privacy policy  
12 that everyone was required to consent to in order to obtain a  
13 service from 23andMe. So a -- an -- an unmissable privacy  
14 policy.

15 Q. And I'm not purporting to quote it, so I'll just  
16 paraphrase it. I think the discussion in the CPO report was,  
17 looking at privacy policy broadly in this way to pick up other  
18 statements is scholarly or academic consensus. Do you agree  
19 with that?

20 A. I don't agree with that.

21 Q. Why not?

22 A. Well, because you can point to many academic and  
23 government reports that don't follow the -- follow that  
24 procedure. Of course, the Federal Trade Commission itself  
25 issued a series of reports in which it examined the privacy

Fred Cate - Direct

1 practices of businesses by examining their privacy policies.  
2 Those reports are again cited in my statement and are publicly  
3 available. The academic literature certainly does not  
4 uniformly or even in its majoritarian way follow that  
5 interpretation of what constitutes a privacy policy.

6 But it also is almost in -- it cannot be reconciled with  
7 the way that the law treats privacy policies, which is  
8 generally as contracts, that they make commitments that can  
9 be -- you can be required to follow. This is much talked  
10 about in the literature. It's very controversial because of  
11 course, these are perhaps contracts without consideration, or  
12 I mean, you can have lots of debate about should they be  
13 contracts.

14 But putting that aside, the Federal Trade Commission,  
15 most state Attorneys General treat a privacy policy as a  
16 contract. And you can't have a contract that can be amended  
17 by -- by anything. By any oral statement. By any bit of  
18 marketing material. Whatever. We usually look to the four  
19 corners of a contract to know what its terms are.

20 Q. Well, let me ask you anyways about the representations  
21 and promises outside of the privacy statement. Outside of the  
22 terms of use that referenced by the CPO. Did you see in the  
23 CPO report or anywhere else in your work in this case any  
24 representations or promises made by 23andMe outside of its  
25 policy documents themselves that discuss or address whether

Fred Cate ~ Direct

1 PII would be transferred or not transferred in connection with  
2 a sale or a change in control transaction?

3 A. I did not see that, and I would say I looked for it  
4 because I was convinced, since the CPO had gone to the trouble  
5 of making this point, we're not just stuck with the privacy  
6 policy, we can look at all of these other things, that  
7 somewhere out there was going to be something that confused  
8 this basic point about was there such a promise, or was there  
9 not such a promise. And so that there would be, if you will,  
10 some smoking gun that -- that that CPO would point to.

11 Looking at all of the things that the CPO addressed, none of  
12 them made that point or raised that issue.

13 Q. So let me turn to the proposed sale itself. And we heard  
14 some testimony about this the other day, but could you just  
15 describe for us what your understanding of TTAM is?

16 A. So my understand -- my understanding of TTAM, it is, in  
17 fact, a reconstruction of 23andMe. It's the same founder.  
18 It's the founder's money. It's the same employees. It's the  
19 same equipment. It's the same data, depending, of course, on  
20 what the Court does here. It's the same everything. And so  
21 it's simply moving through a bankruptcy process to get from  
22 an -- an insolvent setting to a hopefully solvent setting.  
23 Again, with -- with no new anything added, other than things  
24 that may be tax consequences or things I wouldn't otherwise  
25 know about.

Fred Cate - Direct

1 Q. And do those considerations or those facts you just  
2 testified about matter to you from a consumer privacy point of  
3 view?

4 A. Yes. Let me say, they have always mattered to me as a  
5 CPO because it's -- although all that Congress requires is  
6 that there not be a policy in place as of the -- as of the  
7 date the proceedings commenced that prohibited the sale of --  
8 of personal data in connection with a reorganization or -- or  
9 a -- some -- something related to the -- to the bankruptcy.  
10 It's -- it -- it seems like a reasonable person might say, I  
11 want to know that the person taking the assets, buying the  
12 assets, is going to have the capability of living up to that  
13 privacy policy.

14 So for example, the Federal Trade Commission has said we  
15 look for someone in the same line of business. We look for  
16 someone who's -- who's going to operate the same business. We  
17 look for someone who's going to take all the assets, not just  
18 the data. This is exactly that transaction.

19 You know, somebody said Wednesday in court to general  
20 good humor that this was like a perfect transaction. I  
21 don't -- I don't know the first thing about the other aspects  
22 of bankruptcy law, but from a privacy point of view, it kind  
23 of is a perfect transaction. You're not transferring the data  
24 to a third-party. You're not doing anything with the data.  
25 No one new is going to have access to the data. It's going to

Fred Cate - Direct

1 be used for exactly the same thing under exactly the same  
2 policy. And just to sweeten the deal, there's some additional  
3 privacy protections added as part of the asset purchase  
4 agreement. It -- it seems like it could hardly be better,  
5 from a privacy point of view.

6 Q. And you mentioned a couple of, I think, privacy  
7 enhancements made by TTAM that were added to the APA. We saw  
8 them on a slide the other day. We don't need to tick through  
9 all of them. But could you just mention for us the privacy-  
10 related enhancements that you thought were significant?

11 A. Well, frankly, I think all of them are -- are  
12 significant, but I'm not going to go through all of them. But  
13 for example, I think the appointment of a -- of a -- of a  
14 privacy advisory board, this is something that leading edge  
15 companies are starting to do. I've served on a half a dozen  
16 privacy advisory boards. Government agencies in some cases do  
17 it as well. It's a great way to get outside perspectives.  
18 It's a great way to be able to test ideas without committing  
19 to them in the market and to get input from people who would  
20 have different perspectives. And the fact that there's a  
21 voluntary commitment to a privacy advisory board here, I think  
22 is really significant and that -- that's important.

23 I think the fact that there's a -- a recognition of a  
24 perpetual right to -- to opt out, to delete your data. Again,  
25 I think this was fairly clear from the prior policy, as I read

Fred Cate - Direct

1 it, but nevertheless, it's explicit now. There's no debate  
2 over it. TTAM has said, this is what we are. This is what we  
3 are committing to. Of course, the new nonprofit structure,  
4 the not-accepting-contributions-from-affected-parties. The --  
5 and -- and it's a -- it's a -- it's an almost checklist of how  
6 you would enhance the privacy of an already strong privacy  
7 policy and privacy protection program.

8 Q. And in light of those privacy enhancements and the other  
9 terms of the proposed transaction you're aware of, do you have  
10 a view as to whether customers of 23andMe would be better off  
11 or worse off if the proposed sale were be approved, from a  
12 privacy point of view?

13 A. I -- I do have a view.

14 Q. And what is that view?

15 A. I think there's no question that they would be better  
16 off. And I think you get there from either, if you will, a  
17 positive or a negative perspective. In other words, from the  
18 positive, we've talked about the consistency with the FTC  
19 requirements. We've talked about the consistency with  
20 congressional requirements. We've talked about the additional  
21 privacy protections. All of these seem like good things. In  
22 some cases, legally required. In some cases, just good  
23 things. On the other hand, if the sale doesn't go through,  
24 then what happens? The customers don't get the benefits of  
25 the services they paid for.



Fred Cate - Direct

1 MS. MILLIGAN: Objection.

2 MR. NADAL: Objection, Your Honor.

3 MR. RECHER: I'm sorry. Could I ask that the witness  
4 be permitted to finish his answer? If they'd like to move to  
5 strike, we can, of course, address that. But respectfully, if  
6 we could have objections after the question, and then, of  
7 course, they can move to strike if they believe that's  
8 appropriate.

9 THE COURT: I think that's probably -- if the  
10 question itself is objectionable, we'll have the objection  
11 before the witness answers. Otherwise, let's let the witness  
12 finish, and you can strike.

13 MR. NADAL: Okay.

14 Q. I'm sorry, Mr. Cate.

15 A. So -- thank you. So the -- the risk is that the --  
16 the -- the -- the company is not solvent, that the service is  
17 not provided that they paid for, that the jobs are lost, that  
18 the benefit to the economy is lost, the benefit to research is  
19 lost, and that the data then ends up in another court  
20 proceeding, not entirely unlike this one. But the question is  
21 just selling the data outright because it's an asset that now  
22 has value and their creditors, who would need to be paid.

23 So it is always -- and again, this is a feature in my CPO  
24 opinions and all the others that I have seen except for the  
25 present one, you know, better to have a solvent purchaser who

Colloquy

1 can keep protecting the data and using it for the purpose for  
2 which it was intended to be used, than it is to have a -- a --  
3 a deal fall apart.

4 MR. NADAL: Your Honor, I'd move to strike.

5 THE COURT: Come to the microphone, please.

6 MR. NADAL: Your Honor, I would move to strike the  
7 answer on the grounds that there has been no evidence. I do  
8 not believe there's any evidence in the record stating that  
9 the company would liquidate if this transaction's not  
10 approved. If counsel would like to make this a hypothetical,  
11 I'll withdraw the objection for the motion.

12 MS. MILLIGAN: And Texas objects on the basis that  
13 it's pure speculation as to what would happen. And there's  
14 been no foundation for why he thinks that, but it's a  
15 speculative argument.

16 THE COURT: Response.

17 MR. RECHER: Your Honor, Prof. Cate is an expert.  
18 He's explaining the analysis and thought process he went  
19 through in forming the judgments he reached. I don't think  
20 that's objectionable. He's not testifying as a fact witness.  
21 We're not submitting the testimony to prove anything other  
22 than how he reached his views in the analysis he conducted.

23 THE COURT: Mr. Nadal.

24 MR. NADAL: Your Honor, debtors have not moved to  
25 admit or present Mr. Cate as an expert. They have not

Colloquy

1 followed any of the expert proceedings. And so to state that  
2 he is an expert at this stage without offering him as an  
3 expert until just this very moment, we believe is improper.

4 MR. RECHER: I'm happy to offer Prof. Cate.

5 THE COURT: Why don't we -- why don't we do that?  
6 And then we'll figure out what to do about this question.

7 MS. RYAN: The debtors would offer Prof. Cate as an  
8 expert witness in the areas of privacy and the CPO process.

9 THE COURT: Any objection?

10 MR. NADAL: Yes, Your Honor. The People of the State  
11 of California object. There have been no disclosures that  
12 have been provided for Mr. Cate. We have not received any of  
13 the requirements under FRCP 26, which I believe is  
14 incorporated into this proceeding by virtue of Rule 1914. We  
15 have not received anything.

16 MR. RECHER: Your Honor -- go ahead.

17 MS. MILLIGAN: Your Honor, I think before admitting  
18 him as an expert, we should be allowed to cross-examine him as  
19 to his history and background. I think it's only been briefly  
20 mentioned by debtors' counsel. We would posit that he should  
21 not be offered as an expert as well.

22 THE COURT: Okay. I do think an opportunity for voir  
23 dire is appropriate, but we're going to lose track of this  
24 question. So you may remember the question. I'm not going to  
25 remember the question by the time we do that.

Colloquy

1           So let me say this. If Prof. Cate is admitted as an  
2   expert witness, I'll allow the question and overrule the  
3   motion -- I'll allow the answer and overrule the motion to  
4   strike. If he's not admitted as an expert witness, I'll  
5   reconsider it at that time. How about that?

6           MR. RECHER: All right. And I'll revisit it on  
7   redirect as necessary, Your Honor, if that's all right.

8           THE COURT: Okay. Very good. So do we have voir  
9   dire? Texas, they say voir dire, right?

10          MS. MILLIGAN: They do say voir dire.

11          THE COURT: They say voir -- okay. Would you like  
12   voir dire at this point --

13          MR. RECHER: Yes.

14          THE COURT: -- or do you want to -- you can also hold  
15   it for cross-exam.

16          MR. RECHER: Your Honor, and I'm happy to ask the  
17   State of Texas what their preference is. I have maybe two  
18   more questions. I'm happy to let Texas do voir dire as part  
19   of their cross-examination, and we can go from there. But  
20   whatever the Court prefers.

21          MS. MILLIGAN: Yes, and I agree. If he --

22          THE COURT: Okay. We'll just hold off.

23          MS. MILLIGAN: -- wants to his questions, and then  
24   we'll address it on our cross.

25          THE COURT: Okay. Very good. Let's do that.

Fred Cate - Direct

1 MR. RECHER: I promised two or three more questions,  
2 and I'll do my best.

3 BY MR. RECHER:

4 Q. Despite everything you just testified about in terms of  
5 your perspective on the benefits of this proposed sale, we do,  
6 as you know, have some objections. And some states have  
7 objected on the grounds that they believe separate affirmative  
8 consent is required to transfer certain individuals' PII in  
9 connection with this Section 363 sale. Do you believe  
10 separate affirmative consent is appropriate?

11 A. I do not.

12 Q. Why not?

13 A. Affirmative consent, what I'm going to call opt in  
14 consent, was appropriate. It's what was used when the account  
15 was opened. We've already gotten opt in consent on the  
16 record. And so then the question is what about when is reopt  
17 in consent necessary? And here, the evidence is pretty clear  
18 from studies, from academic literature, from the experience of  
19 regulators, consumers don't like being asked the same question  
20 repeatedly. They're very suspicious of it. They don't pay  
21 attention to it. They also often miss opportunities. Post  
22 office reports that fifty-two percent of unsolicited mail is  
23 unopened. And so they're not going to see the opportunity.

24 So in a case like this, it seems like you have paid for a  
25 service. You have opted in. Eighty-one percent of people, I

Fred Cate - Direct

1 believe, from the record, have opted in to the further sharing  
2 for research. They're all in on this. And then they're told,  
3 well, you know, certain state AGs believing so strongly in  
4 privacy want to ignore your prior consent and ask you for  
5 consent again. And that tends to be something that's  
6 irritating to people. And we see this in health settings.  
7 And we see it in financial settings. And I think we would see  
8 it here.

9 MS. MILLIGAN: Your Honor, objection and move to  
10 strike the testimony as to what consumers intend or want and  
11 what the Attorneys General believe or any legal conclusions or  
12 other opinions that are based on other people's opinions and  
13 are not supported in this case. So objection as to that and a  
14 request to strike that testimony.

15 MR. RECHER: I believe the professor is explaining,  
16 again, the thinking and methodology behind his perspectives as  
17 expressed in his declaration. It's not fact witness  
18 testimony, or we will assert it's not fact witness testimony.  
19 It's instead expert testimony. I believe it's admissible.

20 THE COURT: All right. I'll -- because --

21 MS. EICHELE: Your Honor.

22 THE COURT: I'm sorry.

23 MS. EICHELE: I'm sorry. I'm sorry. Elizabeth  
24 Eichele. I too object, Your Honor, with respect to his  
25 testimony regarding what all of the consumers/customers would

Fred Cate - Direct

1 agree to or not agree to with respect to this. This is kind  
2 of a -- a big thing, releasing -- selling people's DNA like  
3 this, and he didn't really cite to any studies or anything in  
4 particular to make those statements. They were just sort of  
5 made.

6 THE COURT: All right. For the record, this is Ms.  
7 Eichele?

8 MS. EICHELE: Yes, Your Honor.

9 THE COURT: Okay. The objection as to consumer  
10 expectations and the like is overruled. I think it's  
11 appropriate for expert testimony, if I admit him as an expert.  
12 I will -- because one thing Prof. Cates said could be  
13 interpreted -- I'm not saying he meant it this way. Could be  
14 interpreted to cast aspersions on the motivations of the  
15 Attorneys General, I'll strike that. I don't think that's  
16 necessary. And let's proceed.

17 MS. MILLIGAN: Okay.

18 BY MR. RECHER:

19 Q. And Prof. Cate, are you familiar with the academic  
20 research around how consumers react to requests for consent?

21 A. Yes, I am.

22 Q. Okay. And are there any downsides, from your  
23 perspective, from -- with respect to requests for separate  
24 affirmative consent after consumers already have opted in to a  
25 particular service?

Fred Cate - Direct

1 A. Yes. So in addition to the ones I think I've already  
2 mentioned, there's some very practical ones as well, which is  
3 we fundamentally work between individuals and consumers in  
4 sort of an asymmetric communications channel. It's usually  
5 easier for an individual to reach an organization, not always  
6 the way we would like, not always as quickly as we would like,  
7 but they tend to have 800 numbers. They tend to have fixed  
8 addresses. They tend to have websites. I think all of that's  
9 true in this case.

10 Whereas for an organization to reach me, they've got to  
11 find me. They've -- they've got to get me. They've got to  
12 find what number I'm using now. What email am I using now.  
13 Maybe not five years ago when I opened my account, but what  
14 today am I using? And that is both a more exhaustive. It can  
15 also mean, if you got it right the first time, the next five  
16 or ten attempts you send me are all just going to be perceived  
17 as -- as irritating. They're -- they're -- they're going to  
18 just keep hammering me.

19 There's also a -- a great tendency, well documented in  
20 the literature, not only of privacy, but of advertising and  
21 many other things, we know this with recalls. We know it in  
22 many areas, motivating people to do something, even if they  
23 want to do it and even if they ultimately do do it. So most  
24 of us, I only need to speak for myself, put things off. Even  
25 if we see it and say, yes, that's a great idea, we don't act



Fred Cate - Direct

1 on it quickly.

2 And so in this case, you're saying, at some point in  
3 time, after you make repeated efforts, after the company makes  
4 repeated efforts to reach me, we're going to shut you down.  
5 We're going to delete your data. We're going to eliminate the  
6 service that you paid for because you procrastinated or you  
7 didn't pay attention. And that is a very challenging  
8 environment for consumers.

9 MR. RECHER: Thank you, Prof. Cate. No further  
10 questions from me at this time.

11 Your Honor, subject to the Court's preferences, what  
12 I would propose, just in terms of the interest of good order,  
13 is if the State of Texas or the State of California has voir  
14 dire questions, they should ask those. If there's any  
15 remaining objection to Prof. Cate's qualifications, we can  
16 discuss that. And we can move on with cross-examination at  
17 that point.

18 THE COURT: I think that makes sense. Let's do voir  
19 dire, or voir dire, as you wish.

20 MS. MILLIGAN: Your Honor, thank you for considering  
21 the Texas pronunciation of voir dire.

22 THE COURT: Of course.

23 MS. RYAN: Dire.

24 THE COURT: We try to be -- try to be welcoming here,  
25 Ms. Milligan.

Fred Cate - Voir Dire

1 MS. MILLIGAN: Thank you.

2 VOIR DIRE

3 BY MS. MILLIGAN:

4 Q. Prof. Cate, my name is Layla Milligan. I'm here on  
5 behalf of the State of Texas. Let's see. You're a current  
6 professor of law; is that correct?

7 A. I -- I am currently a distinguished professor of law,  
8 yes.

9 Q. Okay. And what courses do you teach?

10 A. On a -- on a -- on an annual basis, or a -- they change  
11 all the time, but --

12 Q. Okay. Currently.

13 A. I teach --

14 Q. How about right now?

15 A. I teach information security. I teach information  
16 privacy. I teach a survey course called technology. A  
17 digital -- digital law -- digital legal issues. Oh, and I  
18 teach a course in artificial intelligence.

19 Q. Okay. You have been, you mentioned, a consumer privacy  
20 ombudsman in four cases --

21 A. Yes, ma'am

22 Q. -- in three states? Were any of those dealing with  
23 genetic data?

24 A. Two of them dealt with genetic data, but that wasn't what  
25 they were limited to.

Fred Cate - Voir Dire

1 Q. Okay. So there were two cases that you were the CPO that  
2 involved the transfer of genetic data --

3 A. Exactly.

4 Q. -- in a sale? Can you tell me what the names of those  
5 cases are?

6 A. Monroe County Hospital. I can't off the top of my head.  
7 It's -- it's -- it's in my CV.

8 Q. Okay. Monroe County hospital. What was the genetic  
9 information that was transferred in that case?

10 A. It was held in the patient's records.

11 Q. I'm sorry.

12 A. It was held in the patient's records.

13 Q. The genetic materials and the genetic data?

14 A. Not materials, the data.

15 Q. The data? Okay. Was that because -- and that was a  
16 hospital?

17 A. Yes.

18 Q. So that was a health care provider?

19 A. That's right.

20 Q. Okay. Was the other genetic case involving a health care  
21 provider?

22 A. It was.

23 Q. So it was another hospital or some other health?

24 A. It was.

25 Q. That was involved with --

Fred Cate - Voir Dire

1 A. A -- a health system, yes.

2 Q. Okay. And this was genetic data that would have been in  
3 patient records?

4 A. Exactly.

5 Q. Okay. Are you a 23andMe customer?

6 A. I'm not.

7 Q. Okay. You have stated that you certainly have written a  
8 number of letters, articles, publications about data security  
9 and privacy; is that right?

10 A. Yes.

11 Q. Have any of them been -- have any of them addressed  
12 genetic data or genetic materials?

13 A. I'm just trying to think. I mean, I've written  
14 extensively about health privacy. I've written about privacy  
15 and death and organ donation so -- but I don't think any have  
16 explicitly talked about genetic data, no.

17 Q. Okay. Have you ever taught a class that involved  
18 discussion of the genetic data or the requisite laws involving  
19 genetic data?

20 A. Yes. Health privacy.

21 Q. Okay. And again, that's in the concept of a health care  
22 situation; is that right? Like, related to --

23 A. It -- it wouldn't have to be. In other words, it -- it  
24 would cover state laws dealing with genetic information,  
25 which, typically, I don't have to tell you this, exclude those

Fred Cate - Voir Dire

1 covered by HIPAA so --

2 Q. Okay. Were the two CPO cases that you were involved in,  
3 did they involve HIPAA --

4 A. Yes.

5 Q. -- contemplation? Okay. So you have not been involved  
6 as a CPO -- and I'm using that -- consumer privacy ombudsman  
7 as the shortcut --

8 A. Yes. I -- thank you.

9 Q. Thank you. With a direct-to-consumer genetic testing  
10 company?

11 A. Correct.

12 Q. Okay. Are you familiar with the state laws related to  
13 genetic testing, direct-to-genetic-testing companies?

14 A. I mean, I have passing familiarity with most of them but  
15 not detailed familiarity.

16 Q. Okay. You state in your report several references to  
17 Congress. What is your association with either the U.S. House  
18 or U.S. Senate?

19 A. I've testified more than a dozen times before  
20 congressional committees. I've advised congressional  
21 committees on drafting legislation. I've given both  
22 classified and unclassified briefings to members of Congress  
23 and to congressional committees.

24 Q. Has any of that involved the Bankruptcy Code?

25 A. No.



Fred Cate - Voir Dire

1 Q. Okay. Did any of -- okay. And that includes the  
2 Bankruptcy Abuse Prevention and Consumer Protection Act? We  
3 call it BAPCPA --

4 A. Right.

5 Q. -- in Texas. Okay.

6 A. Yeah.

7 Q. Sorry. Did you consult or talk to any or testify as  
8 to -- I'm going to say BAPCPA. And again, apologies if  
9 that's.

10 A. If -- yeah.

11 Q. Did you -- I'm sorry. No?

12 A. I did not.

13 Q. Okay. Have you ever testified in front of Congress or  
14 the House or the Senate about Section 363 of the Bankruptcy  
15 Code?

16 A. I have not.

17 Q. Okay. Okay. Have you worked with the FTC or been  
18 employed by the FTC?

19 A. I have been an expert witness for the FTC repeatedly.

20 And I've --

21 Q. Okay.

22 A. -- served on FTC commissions. And I have given keynote  
23 addresses at FTC conferences. And so yes. I've never been  
24 paid by the FTC.

25 Q. I'm going to have more questions about your employment in

Fred Cate - Voir Dire

1 this case, but I'm focusing on voir dire questions. I'm  
2 trying. Voir dire. Okay. So you have familiarity with the  
3 FTC from your work with the FTC or your testimony on their  
4 behalf?

5 A. Yes.

6 Q. You did not assist or participate in the drafting of the  
7 Bankruptcy Code or BAPCPA in any way; is that right? That's  
8 what you just said, right?

9 A. That is right.

10 MS. MILLIGAN: Okay. Let's see. I think that's all  
11 the questions I have. Thank you, sir.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Nadal.

14 MR. NADAL: Your Honor, I'm not sure how you'd like  
15 to do this. I don't have any voir dire questions. I just  
16 have argument as to the propriety of Mr. Cate as an expert  
17 witness.

18 THE COURT: Okay. Let's see if there are any  
19 redirect voir dire questions.

20 MR. RECHER: No redirect, Your Honor, but we would  
21 offer Prof. Cate as an expert witness on the same subjects I  
22 mentioned earlier, which are in the area of privacy and the  
23 process for a CPO.

24 THE COURT: Okay. Mr. Nadal.

25 MR. NADAL: Yes, Your Honor. The People of the State

Fred Cate - Voir Dire

1 of California object to the proffer of Mr. Cate as an expert  
2 witness because debtors have failed to comply with the Rules  
3 governing expert witness discovery. With thanks to my  
4 colleagues in Texas, they provided me -- I was not expecting  
5 to have to do this, but they provided me with a copy of the  
6 Codes.

7 And we know that this is a contested matter under  
8 Rule 9014. 9014 incorporates Rule 7026, and Rule 7026 says  
9 that Federal Rule Civil Procedure 26 applies. This is a  
10 contested matter. The Rules governing expert disclosure  
11 apply. Federal Rule of Civil Procedure 26 requires that an  
12 expert report identify the methodology and identify the data  
13 review and be provided ahead of time and disclosed.

14 Mr. Cate's declaration was filed on June 17th, 2025  
15 at 12:22 in the morning. There has been no prior disclosure  
16 of Mr. Cate as an expert witness for debtors. When I landed  
17 in St. Louis and while I was riding the light rail in on June  
18 17th, I emailed debtors, and I asked for a list of the  
19 materials that Mr. Cate relied on. They provided me a list of  
20 the materials that Mr. Cate cited. And to their credit,  
21 debtors did send me on Wednesday while we were in court or  
22 shortly thereafter all of the materials that he cited and all  
23 of the materials that are cited in the CPO report.

24 I again asked for a disclosure of the materials that  
25 he reviewed. Debtors refused to provide it. I had to



Fred Cate - Voir Dire

1 specifically ask if Mr. Cate relied on a June 9th, 2025 email  
2 from counsel for debtors to the CPO that is specifically  
3 identified in the CPO report and a June 6th, 2025 memorandum  
4 from counsel for debtors. They confirmed he did not, but the  
5 expert rules do not contemplate whack-a-mole. I should not  
6 have to review and trawl through a folder that has 566 items  
7 to identify what Mr. Cate did or did not review.

8 Even then, after all that conversation, debtors did  
9 not identify and state that they were going to call him as an  
10 expert. They filed this as a declaration, and that's what  
11 this is.

12 For those reasons, the People would request that the  
13 Court not accept Mr. Cate as an expert witness.

14 THE COURT: Milligan.

15 MS. MILLIGAN: In addition to the issues of Prof.  
16 Cate's, I would say, lack of information or experience in the  
17 genetic data context specifically, and I join California's  
18 concerns. This case has moved at extremely fast rate. Again,  
19 I think we learned about the designated expert literally hours  
20 before the hearing. And were provided no opportunity to do  
21 any sort of discovery or deposition or determine his  
22 qualifications or see what he relied on. And we join  
23 California's objection as well.

24 THE COURT: Thank you.

25 Mr. Recher.

Fred Cate - Voir Dire

1 MR. RECHER: Thank you, Your Honor. Just starting  
2 with California first. I think there was a reference to Rule  
3 9014 and this being a contested matter. Rule 9014(c)(2) says  
4 an exception in contested matters -- or let me put it this  
5 way. Rules 26(a)(1) through (a)(3) don't apply in contested  
6 matters, absent a order from the court otherwise.

7 I would say in any event that the declaration the  
8 debtors filed on Monday on behalf of Prof. Cate I believe  
9 satisfies all of the requirements of Rule 26. It discloses  
10 his opinions. It provides his CV. It identifies the cases in  
11 which he has testified recently. So I think it would satisfy  
12 Rule 26.

13 In any event, with respect to the State of  
14 California's complaints about the materials that were cited or  
15 relied upon, I think we may have a slightly different  
16 perspective. I believe we told the State of California very  
17 promptly that the materials Prof. Cate relied upon were cited  
18 in his report or cited in the CPO's report. They asked us  
19 specific questions about whether he reviewed particular  
20 documents. We answered those.

21 I certainly appreciate that the last couple of days  
22 have been busy for everybody. Of course, we filed old Prof.  
23 Cate's declaration with our reply brief indeed in advance of  
24 the deadline when that reply would be due I believe under the  
25 existing order, which is the day before the hearing. And

Fred Cate - Voir Dire

1 Prof. Cate's report obviously responded to and addressed a CPO  
2 report that we did not receive until seven days before Prof.  
3 Cate submitted his report.

4 So I would submit that the debtor has moved with some  
5 dispatch actually in retaining Prof. Cate, having him conduct  
6 his analysis, and get a report out, even where I would argue  
7 that Rule 26 requirements don't apply here, before he  
8 testified in this courtroom. And --

9 THE COURT: Oh, I'm --

10 MR. RECHER: Sorry. I didn't mean to interrupt you,  
11 Your Honor.

12 THE COURT: No, go ahead.

13 MR. RECHER: I was going to move to address the State  
14 of Texas' objections.

15 THE COURT: Sure.

16 MR. RECHER: I would just say there, I didn't hear  
17 anything in that presentation that called into question his  
18 qualifications or expertise with respect to the subjects for  
19 which he's been offered as an expert witness. I think there  
20 was some perhaps criticism about his background in terms of  
21 genetics. We're not offering him as an expert witness in  
22 genetics.

23 THE COURT: And it is privacy and the --

24 MR. RECHER: Privacy and the CPO process.

25 THE COURT: -- CPO process? Yeah. All right.

Fred Cate - Cross

1 I'm going to accept Prof. Cate as an expert on those  
2 two subjects as requested and overrule the objections. I  
3 agree with the debtors' reading of Rule 1914. That doesn't  
4 mean that litigation by ambush is acceptable, but I don't  
5 think that's what has happened here. Prof. Cate is responding  
6 to a CPO report that was filed not long ago. The CPO report,  
7 although no one has described it this way, the CPO report is  
8 in some respects an expert report, even though Prof. Richards  
9 is not on the stand. And I think it's appropriate that the  
10 debtors, and I guess, in theory, other parties, have an  
11 opportunity to respond to that, more or less in kind.

12 So I think that the states have not had a great deal  
13 of time to prepare for Prof. Cate. Neither have I. Neither  
14 has anybody else. But this case is moving quickly, Ms.  
15 Milligan. But they do. That's how they do. And the debtors'  
16 cash position, among other things, and their DIP lender  
17 require that here.

18 So Prof. Cate will be accepted as an expert on  
19 privacy law and the CPO process.

20 MR. RECHER: Thank you, Your Honor.

21 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

22 THE COURT: All right. Substantive cross-  
23 examination.

24 CROSS-EXAMINATION

25 BY MR. NADAL:

Fred Cate - Cross

1 Q. Good morning, Mr. Cate. Are you aware of who I am?

2 A. Yes, I am.

3 Q. If you don't know, I'm Daniel Nadal. I represent --

4 A. Thank you, sir.

5 Q. -- the People of the State of California. You were hired  
6 by debtors to provide a report responding to Prof. Richards'  
7 CPO report?

8 A. Yes.

9 Q. What date were you hired?

10 A. Sunday before the Thursday report.

11 Q. And what is your relationship with debtor and Paul Weiss?

12 A. None. I had no prior relationship. I -- they're one of  
13 the people who is an employee or a temporary employee of  
14 23andMe as a privacy colleague I've worked with in the past.

15 Q. And I apologize that I'm going to have to ask this  
16 question, but due to the expedited nature of these proceedings  
17 that we've just referred to, we don't have a fee application  
18 on file. So we'll get this answer at some point in the  
19 future, but I'd just like to ask, how much time did you take  
20 to prepare your report?

21 A. Thirty hours.

22 Q. All right. Were you in the courtroom on Wednesday when  
23 we discussed the admissibility of your testimony?

24 A. I was.

25 Q. And do you recall the Court asking about if your report

Fred Cate - Cross

1 could be submitted as an amicus brief?

2 A. Yes, I recall.

3 Q. Have you submitted or joined amicus briefs before?

4 A. I have.

5 Q. And are you aware of Federal Rule of Appellate Procedure  
6 29?

7 A. No.

8 Q. All right. Are you aware that there in the Federal Rules  
9 of Appellate Procedure, an amicus brief has to disclose  
10 different items?

11 A. Yes.

12 Q. And are you aware that one of those is a statement that  
13 indicates whether a party's counsel authored the brief in  
14 whole or in part?

15 A. Yes.

16 Q. All right. If this were filed as an amicus brief, what  
17 would your FRAP 29(e)(1) disclosure say?

18 A. I wrote the brief. Every word of it.

19 Q. Thank you. Let's turn to paragraph 2 of your  
20 declaration. You indicate there that you were provided with  
21 facts and information. You reviewed documents. About how  
22 many materials did you review?

23 A. I don't -- I don't think I can put a number. I mean,  
24 some of them were vast, like the CPO report, and they had many  
25 links to things. And often, I would check the link to see if

Fred Cate - Cross

1 it said what it was being quoted for saying. In terms of just  
2 documents, I sat down and read maybe forty or thirty.

3 Q. Okay. Did you catalog all of the materials that you  
4 reviewed?

5 A. I cited to everything I reviewed, unless it was in the  
6 CPO report.

7 Q. All right. Now, your statement here in paragraph 2  
8 distinguishes between information provided by professionals  
9 advising the debtors and debtors. What did you mean by that?  
10 And I guess I can put a finer point on this. Did you speak  
11 with nonprofessional members of debtors team?

12 A. I did not.

13 Q. All right. Thank you. Now, you just said that you  
14 reviewed materials cited by the CPO, correct?

15 A. I did.

16 Q. And I want to specifically return to two things that the  
17 CPO relied on.

18 A. Okay.

19 Q. Do you have the CPO report in that binder?

20 A. Yes, I do.

21 Q. All right. Could you turn to ECF page 43 or report page  
22 40?

23 A. Yes.

24 Q. I'd like to point you to footnote 160, where the CPO  
25 indicates that he received a June 9th, 2025 email from counsel

Fred Cate - Cross

1 for debtors. Did you review that email?

2 A. Sorry. It's not on -- I -- I'm --

3 THE COURT: You said 160 or 116?

4 MR. NADAL: 160. Apologies.

5 THE COURT: Thank you.

6 A. No.

7 Q. All right. So if have any reason to doubt the CPO's  
8 statement that debtor's counsel reported that while there are  
9 eighteen-million customers currently registered with the  
10 company, nearly one third of those customers have not logged  
11 in during the last three years?

12 A. I have no knowledge of that whatsoever.

13 Q. And that's because you don't view that as an important  
14 fact in this case?

15 A. I don't.

16 Q. Can you turn to ECF page 101, report page 98? On that  
17 page, there's a reference to a thing in the footnotes to a  
18 June 6th, 2025 memorandum from counsel for the debtors. Did  
19 you review that memorandum?

20 A. I did not.

21 Q. All right. So Prof. Richards had access to information  
22 that you did not?

23 A. I'm certain that's true.

24 Q. Did you ask anyone for that information?

25 A. I did not.



Fred Cate - Cross

1 Q. All right. Now, I'm going to shift a little bit. You  
2 devote a whole section of your declaration to the proll (ph.)  
3 and mechanics of consent. That's paragraphs 34 through 46,  
4 correct?

5 A. Yes.

6 Q. All right. Is it fair to say that you disagree with the  
7 CPO report?

8 A. Yeah. I -- I think it's fair to say yes.

9 Q. And to put a finer point on it, is it your position that  
10 where the law does not otherwise require it, an opt out system  
11 is better?

12 A. No.

13 Q. Okay. So how would you put it then?

14 A. I would say opt out and opt in are equally good in terms  
15 of the legal effect they create and that each depends on the  
16 setting in which it's being used. So to open an account, I  
17 think opt in is in many cases preferable. You have a good  
18 chance to provoke the person to look at it. You can make it  
19 part of the agreement. If you're trying to reach to change  
20 something or to do something later, opt in tends to be an  
21 absolute prohibition. You might as well just say no. And so  
22 opt out tends to be a way where you can focus people's  
23 attention and others can, legal officials can, press can,  
24 politicians can, and then let people opt out when they wish.

25 Q. All right. Can you turn to paragraph 37, please? I

Fred Cate - Cross

1 believe somewhere in there, you state, however, there is a  
2 stark difference between the opt in and opt out systems in  
3 terms of their cost and impact?

4 A. Exactly.

5 Q. And by that, you mean that opt in costs more?

6 A. Opt in costs more, except in the situation where you're  
7 opening an account. And I say that repeatedly in here.

8 Q. Right. And you admit that in paragraph 38 that few  
9 consumers respond to opt in opportunities?

10 A. I don't admit it. It's true. I mean, yes.

11 Q. All right. So that means that there's a consumer  
12 response difference between an opt in and opt out framework?

13 A. Not at all. I -- I think you would get almost no  
14 responses to either an opt in or an opt out request.

15 Q. Okay. And then in paragraph 41, I think you say  
16 something that you just said right now, which is that  
17 requiring opt in is basically the same thing as a prohibition,  
18 other than when you're opening an account for services?

19 A. Exactly.

20 Q. And then this culminates in a line in paragraph 42, where  
21 you say, this is why legislatures and regulators rarely  
22 require opt in consent?

23 A. That is --

24 Q. It's rare to require opt in consent?

25 A. Exactly.

Fred Cate - Cross

1 Q. And so those instances where legislatures have required  
2 opt in consent, those legislatures view it as sufficiently  
3 important to require it?

4 A. Or they're misguided, in my judgment, or they -- opt in  
5 is often presented as a better approach. I don't think it is.  
6 But if a legislator is given a chance to do something they  
7 think's good or do something better, they may understandably  
8 do the thing that they believe is better.

9 Q. All right. Now, so you might disagree with the  
10 legislature from an economic or policy standpoint, but you'd  
11 agree that when a legislature passes a law, that's the law?

12 A. Yes.

13 Q. All right. Now, did you review all the different privacy  
14 and genetic laws at issue in this case?

15 A. I did not.

16 Q. All right. And I didn't mean that as a gotcha because I  
17 haven't done it myself.

18 A. No.

19 Q. Now, the state laws can conceptually run the gamut here,  
20 can't they?

21 A. Yes.

22 Q. So some states may not have relevant laws?

23 A. Yes.

24 Q. Some states may have laws with exceptions?

25 A. Yes.

Fred Cate - Cross

1 Q. And some might have opt out laws?

2 A. Yes.

3 Q. Now, you've been here all morning and on Wednesday,  
4 correct?

5 A. Yes.

6 Q. And you heard this morning that various states have  
7 reached a resolution of their objections in some fashion?

8 A. Yes.

9 Q. And you see that I'm still here, member of the California  
10 Attorney General's office, objecting to the sale. Can you  
11 maybe take a guess at what California's law is in this  
12 context?

13 A. Well, I -- I mean, I know California's law is an opt in  
14 law.

15 Q. All right. Thank you. So you testified on direct that  
16 privacy policies are treated like contracts?

17 A. In many instances.

18 Q. Now, when the legislature has stepped in and provided  
19 specific requirements, does that go beyond a contract?

20 A. Yes.

21 Q. All right. Now, debtors asked you about whether the  
22 privacy policy and what TTAM are agreeing to are being the  
23 same, and you described this as a perfect transaction,  
24 correct?

25 A. I did.

Fred Cate - Cross

1 Q. Did you compare debtors' and TTAM's proposed privacy  
2 enhancements to California state law?

3 A. I did not.

4 Q. All right. So hypothetically, if those protections were  
5 less than what California state law currently requires, would  
6 that be a bonus for the sale to California residents?

7 A. It would not matter because Congress has already said you  
8 don't have to adhere to nonbankruptcy laws, and that would  
9 include California's law.

10 Q. You testified that the privacy enhancements are a benefit  
11 to this transaction?

12 A. I did.

13 Q. If those privacy enhancements are less than what  
14 California state law provides, hypothetically, would that be  
15 an enhancement to the sale for California residents?

16 A. Well, the word "less" there has virtually no meaning,  
17 because that assumes that California's law could be measured  
18 as better or less. As more or less. All I'm saying is that  
19 opt in and opt out are entirely different ways of implementing  
20 exactly the same legal protection.

21 So a choice that makes a more expensive way to implement  
22 a legal protection or a choice that makes a less expensive  
23 way, a choice that respects existing consumer choice or a  
24 choice that ignores existing consumer choice, those would all  
25 go into the question of is it better or is it less or is it

Fred Cate - Cross

1 more. I'm not -- in this case, I think the privacy policy and  
2 enhancements is better than requiring an opt in would be.

3 Q. You're a law professor, correct?

4 A. I am.

5 Q. You're aware of hypotheticals?

6 A. Yes.

7 Q. So I asked you a hypothetical.

8 A. Okay.

9 Q. Hypothetically, the protections in these privacy  
10 enhancements were less than California state law requires.

11 Would that be a benefit to the sale for California residents?

12 A. If they offered less protection than California state law  
13 would offer, that would not be a benefit.

14 Q. All right. And then if those protections were --  
15 hypothetically, if those protections were the same as what  
16 California state law required, would that be an improvement on  
17 the sale for California residents?

18 A. It would be a -- a wash.

19 Q. It'd be a wash? All right. I want to return to  
20 paragraph 41, and this is your idea that opt in can be the  
21 equivalent of a prohibition. Now, you have two citations here  
22 in footnote 37 and 38. And in I think it's footnote 38,  
23 you're citing your 2002 and 2003 articles, Michael E. Stern,  
24 and specifically a pincite at 768 to 69. You see that?

25 A. I do.

Fred Cate - Cross

1 Q. Now, in that part of the article, you were discussing the  
2 US West, now Qwest Communications' affirmative consent trial  
3 that was conducted in 1997. Are you familiar with that?

4 A. Yes.

5 Q. All right. Qwest reached out to its customers in two  
6 different ways, through telemarketing and direct mail. And  
7 the positive response rate for direct mail was between five  
8 and eleven percent?

9 A. Yes. I'm thinking -- I mean, I don't have it in front of  
10 me, so that sounds right.

11 Q. Right. And the telemarketing opt in rate was twenty-  
12 eight percent. But you report in there that Qwest decided it  
13 was too costly to pursue this action, and so they discontinued  
14 it. Do you recall what the approximate cost was to get each  
15 positive response?

16 A. I -- I don't.

17 Q. All right. If I told you that the telemarketing cost was  
18 twenty dollars per positive response, and the positive  
19 response for the direct mail test was twenty-nine to thirty-  
20 four dollars, would that probably be correct?

21 A. That would -- that would not surprise me.

22 Q. All right. So based on the cost to the company, you then  
23 write at page 769 that you're treating, for analytical  
24 purposes, the opt in regime as effectively blocking the  
25 effective forms of data sharing? And --

Fred Cate - Cross

1 A. Well, there's a -- that's a non sequitur. In other  
2 words, we discuss in detail, Prof. Staton and I -- he -- he's  
3 an economist. I'm a law professor. The affect that raising  
4 the cost of a transaction by a third can have on offering that  
5 product or service to somebody. That, of course, was twenty-  
6 five years ago, before the proliferation of email and text and  
7 all of these other things. So it's relevant. It's probably  
8 even more relevant now, where companies spend much more to  
9 actually attract a new customer in the way that Qwest was  
10 trying to do.

11 Q. Right. And it's easier to send an email now than it was  
12 back then to, like, telemarket and send direct to mail,  
13 correct?

14 A. And it's virtually certain the email will be ignored now.

15 Q. I'd like you to confirm my hypothesis there. What --

16 A. It is easier to send an email.

17 Q. It is cheaper to send an email?

18 A. It is cheaper to send an email.

19 Q. So it's not impossible to get opt in consent, it's just  
20 costly?

21 A. It is often impossible. There are many studies of opt in  
22 where it proved impossible.

23 Q. Did --

24 A. I cite -- sorry. I'll stop.

25 Q. No, go ahead. I didn't mean to interrupt.



Fred Cate - Cross

1 A. Well, I cite to a study by the National Health Council  
2 talking to patients and caregivers about opt in for research.  
3 And again, their number one objection was stop contacting me.  
4 I've already given you my data. I've given you my consent.  
5 Why do you keep reaching out to me? Because every time you  
6 do, I think it's bad news. And so there is a tendency to  
7 respond negatively to getting the same communication over and  
8 over again.

9 Q. But it's still possible to get opt in consent?

10 A. It is possible at the time of opening an account. It's  
11 also possible, and we have very good data on this, if a  
12 consumer calls a company complaining about something, you can  
13 convert that to a sale because you have their attention.  
14 They're already giving you attention, even if they hate you at  
15 the time that they've called. So they call wanting to cancel,  
16 and you end up selling them a -- a -- you know, another year's  
17 package of something because it's getting their attention that  
18 is the great challenge in the digital economy.

19 Q. Right. So what you're telling me is that Qwest didn't  
20 get any positive opt ins?

21 A. I'm telling you Qwest didn't get enough at a price that  
22 made the service affordable to offer --

23 Q. Thank you.

24 A. -- or profitable.

25 Q. Now, let's talk about bankruptcy. Actually, we can skip

Fred Cate - Cross

1 that. We just talked about that. Let's go down. Let's go  
2 back to talking about bankruptcy and look at paragraph 16 --

3 A. Okay.

4 Q. -- where you say -- I want to talk about what an effect  
5 on the date of the commencement of the case means to you.

6 I've got a series of hypotheticals for you, if that's all  
7 right. Hypo one. Debtor has a privacy policy in 2020

8 prohibiting the sale of PII. Customer signs up in 2021.

9 Debtor files bankruptcy in 2024. What policy is in effect?

10 A. Well, it depends on the policy that is currently in  
11 effect on the 23andMe website.

12 Q. No, I'm talking about hypotheticals here.

13 A. It's on the hypothetical company's website. Thank you  
14 for clarifying.

15 Q. All right. So hypo 2. Debtor has a privacy policy in  
16 2020 prohibiting the sale. Customer signs up in 2021. And  
17 debtor changes the privacy policy the next year, 2023, to  
18 allow sale. Debtor files bankruptcy in 2024. What policy is  
19 in effect?

20 A. The policy in a -- publicly available on the website.

21 Q. So the 2023 one?

22 A. Right, assuming it hasn't been changed since then.

23 Q. Right. And can you assume in all these hypotheticals  
24 that the policy doesn't change, unless I --

25 A. I will assume.

Fred Cate - Cross

1 Q. -- say it does? All right. Thank you. Hypo 3. Debtor  
2 has a privacy policy in 2020 prohibiting the sale. Customer  
3 signs up in 2021. Customer becomes incapacitated in 2022.  
4 Debtor changes the privacy policy in 2023 to allow a sale and  
5 files bankruptcy in 2024. What policy is in effect?

6 A. The policy on the website.

7 Q. The 2023 policy?

8 A. Yes.

9 Q. All right. Hypo number 4. Debtor has a privacy policy  
10 in 2020 prohibiting a sale. Customer signs up in 2021. The  
11 customer dies in 2022. Debtor changes the privacy policy in  
12 2023 to allow the sale. Debtor files bankruptcy in 2024.  
13 What policy's in effect?

14 A. The policy on the website.

15 Q. Hypo 5. State law prohibits the sale of PII. Debtor has  
16 a privacy policy prohibiting the sale in 2020. Customer signs  
17 up in 2021. On January 1st, 2024, debtor changes their policy  
18 to say, we can sell your PII. The next day, debtor files  
19 bankruptcy. What policy is in effect?

20 A. The policy in effect on the date the bankruptcy was  
21 filed.

22 Q. So that's the January 1st, 2024 policy?

23 A. Right.

24 Q. Even though it violates applicable state law?

25 A. Yes.

Fred Cate - Cross

1 Q. Now, I want to discuss what prohibit means to you. And I  
2 want to -- your analysis is that there's a three-step  
3 framework and that if it doesn't prohibit, you -- if the  
4 privacy policy does not prohibit the sale of PII, you don't go  
5 anywhere else. You stop right there. Correct?

6 A. Yes.

7 Q. All right. So if you recall, when we discussed in  
8 paragraph 41, you contended that opt in frameworks could  
9 amount to a prohibition?

10 A. Yes.

11 Q. So a privacy policy that required an opt in for the sale  
12 of PII would, in your view, be the same thing as a policy  
13 prohibiting the sale of PII?

14 A. I believe it would operate in the same way, yes.

15 Q. That's not the question I asked. Would a privacy policy  
16 that required opt in for the sale of PII be the same thing as  
17 a policy prohibiting the sale of PII?

18 A. It would use different words, but it would operate  
19 exactly the same way.

20 Q. And would it be treated the same way under the Bankruptcy  
21 Code?

22 A. No.

23 Q. So would the -- so if a privacy policy has an opt in for  
24 the sale of PII, that is different than a policy prohibiting  
25 the sale of PII for purposes of the Bankruptcy Code?

Fred Cate - Cross

1 A. Yes.

2 Q. Even though, in your view, opt in is the exact same thing  
3 as a prohibition?

4 A. Yes.

5 Q. All right. In paragraph 29, you state, in the absence of  
6 an express commitment in a privacy policy not to sell data to  
7 a third-party, that type of language, that would be a  
8 prohibition, correct?

9 A. Sorry. I'm just looking for --

10 Q. Sorry. Yes, I apologize. I was moving too quickly.

11 A. Yeah. Paragraph 29.

12 Q. Yeah, it's buried in the middle there. You say, "in the  
13 absence of an express commitment in a privacy policy not to  
14 sell data to a third-party"?

15 A. Right.

16 Q. You view that as a prohibition?

17 A. An express commitment not to sell data? Yes.

18 Q. Yes. So if a company said, we do not sell personal  
19 information to third parties, that would be a prohibition?

20 A. It -- it would be. Again, you would have to look at the  
21 rest of it. In other words, if it said, we don't sell it,  
22 other than in connection with your organization, or if it said  
23 it here, but then elsewhere, it said, but you are giving us  
24 consent to sell it here, you have to look at the whole policy.  
25 But if the policy prohibited the sale, then it would -- it

Fred Cate - Cross

1 would act as a -- a prohibition. It would trigger a review.

2 Q. So again, if a policy, the only thing it said was, we do  
3 not sell personal information to third parties, that would be  
4 a prohibition?

5 A. If that were the only thing it said, that would be a  
6 prohibition.

7 Q. All right. And in paragraph 17 and on direct, you talked  
8 about how debtors' privacy policy, in place since 2007,  
9 provides that personal data may be transferred in connection  
10 with a change in control transaction?

11 A. Yes.

12 Q. And then on direct, you said that a reasonable person  
13 would look at the previous historical policies. And so you  
14 view the continuity of policies as important?

15 A. I view it as not necessary, but I think it -- yes, I  
16 think it's important.

17 Q. It's something that a reasonable person would do?

18 A. Yes.

19 Q. All right. And now, I would like for you to get the Ms.  
20 Jami Vibbert declaration binder.

21 MR. NADAL: I don't have a copy of it. If someone  
22 could provide it to me, I would appreciate it.

23 Excuse me. Your Honor, may I approach the witness?

24 THE COURT: Yes.

25 THE WITNESS: Thank you.

Fred Cate - Cross

1 MR. NADAL: I'd like to start by thanking my  
2 colleagues at Quinn Emanuel for providing the binder for Mr.  
3 Cate.

4 Q. I believe what you have before you is a Quinn Emanuel  
5 trial binder, which has tab 2. It's Ms. Jami Vibbert's  
6 declaration binder. Do you see that?

7 A. I do.

8 Q. Now, can you turn to exhibit 28 of that? And I'll help  
9 you here. It's on page 324.

10 A. Okay. I have it.

11 Q. All right. Now, that's exhibit 28, correct.

12 A. Exhibit 28, yes.

13 Q. Yes. Now, the next page is 325. Do you see that it's a  
14 privacy notice for California residents?

15 A. I do.

16 Q. Its effective date is January 1st, 2020?

17 A. Yes.

18 Q. And you see that in that first paragraph there, it says  
19 that, "In the event of any conflict in terms of this notice  
20 and the privacy statement, the terms of this notice prevail"?

21 A. Okay. Yes.

22 Q. Do you see that? Can you drop down to the bottom of the  
23 page where it says, "consumer rights"?

24 A. Yes.

25 Q. Do you see that -- let's see here. Consumer rights. We

Fred Cate - Cross

1 have to turn to the next page actually and drop down to 3,  
2 which is opt out of sales. Do you see that?

3 A. Yes.

4 Q. And it says you have the right to opt out of sales. I'm  
5 paraphrasing there. But then the second sentence there says,  
6 "23andMe does not sell personal information to third parties"?

7 A. Yes, I see that.

8 Q. All right. Let's turn to exhibit 27, which is at page  
9 319.

10 A. Got it.

11 Q. All right. The next page is 320. This is a little  
12 bit -- appears a little different right, but it's still a  
13 privacy notice for California residents?

14 A. Right.

15 Q. It was last updated on August 2nd, 2022?

16 A. Yes.

17 Q. And it again also has that in event of any conflict, the  
18 terms of this notice prevail?

19 A. Yes.

20 Q. Can you look at the summary section on that same first  
21 page?

22 A. Got it.

23 Q. It says, here's a summary before we dive into the  
24 details.

25 A. I see this.



Fred Cate - Cross

1 Q. And then in the first bullet point, "You have the right  
2 to know whether we sell your personal information and opt out  
3 of a sale if we do. But rest assured, we do not sell your  
4 personal information"?

5 A. Right.

6 Q. Same page at the very bottom. Does it say, the very last  
7 line there, "23andMe does not sell personal information to  
8 third parties"?

9 A. Yes.

10 Q. So let's go back to your paragraph 18. You say that  
11 there are no grounds for any claim that the policy at any time  
12 prohibited the transfer of PII. We just looked at two  
13 policies, yes?

14 A. Yes.

15 Q. And one of those policies said, we do not sell personal  
16 information?

17 A. Yes.

18 Q. The other said, we do not sell personal information to  
19 third parties?

20 A. Yes.

21 Q. So and these are debtors' privacy policies?

22 A. Yes.

23 Q. Did you review these?

24 A. I did not.

25 Q. All right. Thank you. Let's turn to paragraph 39 of

Fred Cate - Cross

1 your declaration.

2 THE COURT: Sorry. You said 39?

3 MR. NADAL: 39. Yes, Your Honor.

4 THE COURT: Thank you.

5 A. Got it.

6 Q. You say, "Especially in a case like the present one,  
7 where consumers have already opted into the use of their data  
8 that includes a sale, what are they to make of a new request  
9 asking them to consent again?" But we just looked at the  
10 January 2020 California resident privacy policy, and a  
11 California resident who signed up in February 2020 opted into  
12 the use of -- sorry. Excuse me. Did a California resident  
13 who signed up in February 2020 opt in during the sign up to  
14 the use of their data that includes a sale?

15 A. Well, to be honest, I don't know because I would have to  
16 read the rest of the policy and know the context in which it  
17 occurred. You know, you've given me one line. I understand  
18 that line, but I'd need the rest.

19 Q. All right. But you didn't review this?

20 A. Exactly, so I'm not going to answer the question because  
21 I haven't reviewed it.

22 Q. All right. We just looked at the August 2022 California  
23 privacy policy. California resident who signed up in  
24 September 2022 opted in to the use of their data that includes  
25 a sale?

Fred Cate - Cross

1 A. Well, that's the one that I think specifically talked in  
2 connection with third parties. So again, we would need to  
3 know how that squares with 363. But we'd also have to know  
4 the rest of the policy. And particularly where something says  
5 summary of rights, that particularly tells me it's not the  
6 whole policy.

7 Q. All right. Let's go back to exhibit 28. That's again  
8 page 324. Well, actually 325 for the actual --

9 A. Right.

10 Q. -- privacy policy. Again, this is a privacy notice for  
11 California residents?

12 A. Yes, but it says, "This privacy notice" -- sorry. I'm in  
13 the fourth line.

14 Q. Yes.

15 A. "This privacy notice for California residents supplements  
16 our privacy statement."

17 Q. Yes. And then the -- and it goes on to say that, in the  
18 term -- "In the event of a conflict, this notice prevails"?

19 A. Right. But there's no clear conflict here between a  
20 paragraph about what happens if you're sold in a  
21 reorganization and selling data to a third-party over here.  
22 In fact, prior policies maintain that distinction the whole  
23 way through them.

24 Q. Um-hum.

25 A. So unless California residents -- I mean, they're going

Fred Cate - Cross

1 to have to do the same interpreting that anyone else does to  
2 say, it's not going to be sold like the way we think of a  
3 sale. For marketing. For something like that. But on the  
4 other hand, if the business is sold, then of course my data is  
5 going to be sold, as it says in the privacy policy.

6 Q. All right. I want to go back to your statement that  
7 there's a difference between the summary and what the actual  
8 rights are.

9 A. Okay.

10 Q. Again, on exhibit 28, we talked about the summary at  
11 first, right? There's the summary portion?

12 A. Right.

13 Q. And then we go down to on the bottom of the page where it  
14 says, consumer rights. Is that a summary?

15 A. Well, it's clearly not the whole privacy policy because  
16 it's much shorter than the privacy policy. So unless people  
17 in California get fewer rights than people everywhere else in  
18 the country do, I assume it is still what it says it is. A  
19 supplement to the privacy policy.

20 Q. And as part of that description of consumer rights, it  
21 says, "23andMe does not sell personal information to third  
22 parties"?

23 A. Right.

24 MR. NADAL: No further questions.

25 THE COURT: Thank you.

Fred Cate - Cross

1 Ms. Milligan.

2 CROSS-EXAMINATION

3 BY MS. MILLIGAN:

4 Q. Hello again, Prof. Cate.

5 A. Hi. How are you?

6 Q. Again, Layla Milligan on behalf of the State of Texas.

7 First, let's see. I think you testified the debtors'

8 professionals hired you; is that correct?

9 A. Excuse me. I just didn't hear the start of the --

10 Q. Who hired you? Was it the debtor?

11 A. The debtor.

12 Q. 23andMe?

13 A. Yes.

14 Q. Okay. And you were hired June 8th. Does that sound

15 right? You said the Sunday --

16 A. Sunday, a week ago.

17 Q. -- before Thursday -- okay. Okay. Have you been paid?

18 A. No.

19 Q. Not yet?

20 A. No.

21 Q. Okay. Do you know who will pay you?

22 A. I hate to say no. I think the debtor will pay me.

23 Q. Okay. Is there someone paying your travel expenses for

24 this hearing?

25 A. No, not yet.

Fred Cate - Cross

1 Q. No? Not yet. Okay. Is that --

2 A. I hope they do.

3 Q. They will be? Okay. And your employment and this report  
4 was not -- I'm sorry. Your employment and payment of  
5 compensation is not contingent on the results in your report,  
6 correct?

7 A. No.

8 Q. Okay. Have you met Anne Wojcicki before? And I'm going  
9 to -- I apologize to Anne Wojcicki for mispronouncing her name  
10 but --

11 A. I had not met her until Wednesday.

12 Q. Wednesday? Okay. And was that here in court?

13 A. It was.

14 Q. Okay. Have you ever had any communications with her  
15 outside of Wednesday?

16 A. Not to my knowledge.

17 Q. Okay. Have you ever performed any work for her or  
18 23andMe?

19 A. No.

20 Q. Okay. Or any of her foundations?

21 A. Again, not to my knowledge.

22 Q. Has either Anne Wojcicki personally or through her  
23 foundations or 23andMe ever paid you directly for work  
24 performed?

25 A. Never.

Fred Cate - Cross

1 Q. Or donated funds to any organization on your behalf?

2 A. No.

3 Q. Are you associated with any organizations who've received  
4 funds from Anne Wojcicki or her foundations or nonprofits?

5 A. Not to my knowledge.

6 Q. Are you associated with any organizations who have  
7 received funds from 23andMe?

8 A. No. Again, not to my knowledge.

9 Q. Okay. And I say that because on your CV, you're a member  
10 of many various boards, and so okay. I'm going to start with  
11 your report. Let's see. In your report, you're focusing a  
12 lot on 363(b)(1)(A), correct, because of --

13 A. Correct.

14 Q. Okay. What is your -- well, I'm going to assume your  
15 familiarity, but are you familiar with 363(b)(1)(B)?

16 A. Yeah. Yes.

17 Q. I'll read it. "After appointment of a consumer privacy  
18 ombudsman in accordance with Section 332 and after notice and  
19 a hearing, the court approves such sale or lease, giving due  
20 consideration to the facts of the sale and finding no showing  
21 was made that such sale or lease would violate applicable  
22 nonbankruptcy law, right?

23 A. Yes.

24 Q. And you're aware that a CPO has been appointed in this  
25 case?



Fred Cate - Cross

1 A. Yes.

2 Q. Okay. And there's no condition on that (b)(1)(B) that  
3 after the appointment of a CPO, the court may take these  
4 things into consideration?

5 A. I mean, in this case, the -- the parties stipulated to a  
6 range of questions or issues or topics for the CPO, and the  
7 CPO has addressed them widely.

8 Q. Okay. So you don't contest that a CPO has been appointed  
9 in this case?

10 A. Goodness, no. No.

11 Q. And that the Court may consider his report?

12 A. Absolutely not.

13 Q. Okay. Your comment, let's see. You have a lot of  
14 references to Congress's preference on things and sort of I  
15 guess the Bankruptcy Code's feelings. It literally said  
16 Bankruptcy Code respects the choices. Are you familiar with  
17 the recent hearings of the House Appropriations committee and  
18 the Senate Judiciary committee regarding 23andMe?

19 A. I -- I am. I mean, only from what I've read in the  
20 paper, but yes.

21 Q. Did you watch or listen to those testimony?

22 A. I did not.

23 Q. Okay. Would it surprise you that members of Congress are  
24 not pleased and are not expressing a preference for personal  
25 data to be sold in bankruptcy?



Fred Cate - Cross

1 A. In a hearing, nothing would surprise me.

2 Q. Okay. All right. In your paragraph 7 -- let's see. In  
3 paragraph 7, the CPO, you state, and that's page 4, I'm sorry,  
4 of your statement. The CPO and some state Attorneys General  
5 prefer a different approach to that laid out by Congress and  
6 the FTC. And then you go on to say, this policy preference is  
7 contrary to the demonstrated behavior of the debtors'  
8 customers. Is it your opinion that a law that is passed by a  
9 state legislature is a policy preference?

10 A. It -- it -- it -- it -- it may be. My -- I mean, my  
11 opinion is that the law expresses the preference of whoever  
12 enacted it.

13 Q. Like the legislature, on behalf of its constituents,  
14 which are the State of Texas --

15 A. Yes.

16 Q. -- and individuals? Okay. So when a legislature  
17 represents individuals in a state and pass a law, would it be  
18 safe to assume that the consumers of that state agree with the  
19 law that's passed?

20 A. No.

21 Q. No? Okay.

22 A. No, it would be safe to say that the legislatures --  
23 legislators and the governor agree with that law.

24 Q. Okay. But the legislators are elected officials,  
25 correct?

Fred Cate - Cross

1 A. Right.

2 Q. Okay. So let's see. In paragraph 20, and it's on page  
3 8, there's one sentence, the last sentence of paragraph 20, I  
4 just want to point out to you and make sure I understand what  
5 you're saying. And I'm going to read it to you. It says, "It  
6 is untenable to argue that every future statement about  
7 privacy unilaterally amended or modified the terms customers  
8 previously acknowledged and accepted"?

9 A. Yes.

10 Q. So does that apply to consumers who may have signed a  
11 privacy statement in 2010 that says something different and of  
12 a later future, like, modified privacy statement?

13 A. I'm not exactly sure I know what you mean, but --

14 Q. I mean, would this apply to consumers?

15 A. But -- but in other words, nobody can amend the privacy  
16 statement -- the privacy policy through a statement. Not a  
17 consumer. Not a company.

18 Q. Okay. I believe that you had -- in the exhibit B that  
19 you were talking about, there was a privacy statement. Let's  
20 see. This is your binder.

21 A. My binder? Okay.

22 Q. This is Prof. Cate binder. I know you've got a lot of  
23 binders there. I apologize for that.

24 THE COURT: So we're in tab 5, exhibit B?

25 MS. MILLIGAN: Yes. Thank you.

Fred Cate - Cross

1 THE COURT: Okay.

2 THE WITNESS: Thank you.

3 A. This is a sale hearing. Prof. Fred H. Cate binder, tab  
4 5, exhibit B. And I'm looking at the first page says,  
5 "Privacy statement"?

6 A. Yes.

7 Q. Can you read the first, I guess, what do you call it?  
8 First indented paragraph under summary?

9 A. "23andMe respects your privacy. 23andMe does not sell,  
10 lease, or rent your individual level personal information  
11 without explicit consent."

12 Q. Okay. Would you count that as an affirmative promise or  
13 contract with the debtors -- or sorry. The debtors. The  
14 consumers who read that that they -- that 23andMe does not  
15 sell, lease, or rent your individual personal information  
16 without explicit consent?

17 A. Well, it would have to be read in context again. So  
18 first of all, it's in a paragraph labeled summary, which  
19 largely makes it irrelevant to start with. So we want the  
20 actual text of the privacy policy, not just a -- not just a  
21 summary of it. So we --

22 Q. I'm sorry. I'm sorry. I'm going to interrupt you really  
23 quick --

24 A. Of course.

25 Q. -- before you move on. So you're telling me if a

Fred Cate - Cross

1 consumer opened this privacy statement. Read the first line.  
2 They would not believe -- or it would be in, I guess -- they  
3 would be confused or think that their data might be sold?

4 MR. RECHER: Objection, Your Honor. And I would just  
5 ask --

6 THE COURT REPORTER: Podium.

7 THE COURT: Oh, sorry. Come to this -- we need this  
8 mic for the court reporter.

9 MR. RECHER: Thank you, Your Honor.

10 THE COURT: -- even though that one will broadcast  
11 throughout the room.

12 MR. RECHER: Objection. And I would just ask that  
13 counsel refrain from interrupting the witness when he's in the  
14 middle of the answer and allow him to finish his answer and  
15 then ask whatever follow up questions she might have. And I  
16 object to the question on that basis.

17 THE COURT: I think, as a general rule, that's a  
18 good -- I think, here, we're okay. I think I understand we're  
19 getting back to where Prof. Cate was going eventually. And of  
20 course, you can redirect. But as a general matter, if you'd  
21 let the witness answer this.

22 MS. MILLIGAN: Sure, Your Honor. And I apologize. I  
23 felt like he was moving off of the question. So I apologize  
24 for the interruption.

25 THE COURT: Okay. So what's the question currently

Fred Cate - Cross

1 pending?

2 Q. I believe what the question was is a consumer, in your  
3 opinion, would read the first line of the privacy statement  
4 but would have the context of saying, well, this is a summary,  
5 so it doesn't really mean what it says; is that right?

6 A. I would say that the Federal Trade Commission for thirty  
7 years has dealt with this issue. It likes short, pithy  
8 privacy policies. And the problem is lawyers don't enforce  
9 them like that. So companies are very hesitant to say  
10 something up front by way of summary, knowing that in the back  
11 end, there's going to be something that, you know, could  
12 appear to contradict it.

13 So for example, I'm just going to finish quickly, and  
14 then you can strike it. But you can say, we do not sell,  
15 lease, or rent your individual level data. However, almost  
16 everyone knows you're going to provide it to your lawyer.  
17 Your auditor. Your -- these are all people who might get some  
18 of the data. So usually statements like that are followed in  
19 the privacy policy by saying, yes, but it doesn't apply to  
20 these situations. In this case, it's followed by saying it  
21 doesn't apply in the event of a -- of a reorganization or the  
22 sale of assets.

23 MS. MILLIGAN: Okay. So thank you for that. I will  
24 ask to strike everything after the initial response.

25 THE COURT: Overruled. I think it's a fair response.



Fred Cate - Cross

1 MS. MILLIGAN: Okay. Thank you.

2 Q. So I'm going to ask you to -- so we've talked about the  
3 first sentence. Let's turn the page to the next page. And  
4 just above, do you see the section, "Your choices"?

5 A. I do, yes.

6 Q. Just above that, there's a statement that says, "We will  
7 not disclose your individual level personal information to any  
8 third-party, except under the following circumstances." And  
9 what does the bottom bullet point say?

10 A. You have provided explicit consent for us to do so.

11 Q. Okay. So again, there's a second statement in this  
12 policy that assures consumers that their personal information,  
13 which includes genetic information, will not be disclosed to a  
14 third-party unless they have explicit consent from the  
15 consumer?

16 A. Except we're still not in the full privacy statement.

17 Q. I mean, we're in the privacy statement, right?

18 A. No, we're -- we're actually not.

19 Q. Okay.

20 A. Full privacy statement is at the bottom of that page.

21 Q. Okay. So --

22 A. I mean, I'm just reading it. I don't --

23 Q. Okay.

24 A. Yeah.

25 Q. But the individuals have to click through this and review

Fred Cate - Cross

1 it, right?

2 A. Exactly.

3 Q. Okay. Are you familiar with the Deceptive Trade  
4 Practices Act?

5 A. In Texas or in the --

6 Q. I mean, I think there's a federal rule.

7 A. I -- I know the federal one, yes.

8 Q. Okay. Would a statement that is made to consumers that  
9 is not complied with be considered a misrepresentation?

10 A. It would not be if it was clarified in the same document,  
11 and especially if it's clarified in a equally prominent way,  
12 so assuming the typefaces are the same and so forth.

13 Q. Okay.

14 A. And again, the Federal Trade Commission's brought close  
15 to 300 cases in this area. This is very well established law.  
16 And it's designed by the Commission to try to encourage folks  
17 to do what we call layered notices. Start small, then keep  
18 building out. Keep building out. And as long as you do it  
19 all in an accessible thing, accessible place, one web page,  
20 for example, it's considered appropriate.

21 Q. So okay. I'm kind of -- I'm working through the eyes of  
22 a consumer.

23 A. I understand.

24 Q. A consumer opens a privacy statement. They see the first  
25 line under summary. Then there's definitions, personal

Fred Cate - Cross

1 information, how we use your information, your choices, and  
2 actually how we use your information states affirmatively that  
3 you have to have explicit consent to transfer or disclose the  
4 genetic data.

5 And then they continue to scroll several more pages to  
6 the last page of this policy that the statement can be -- that  
7 there could be a business transition. It says, "In such a  
8 case" -- I'm looking at business transactions, I'm sorry, on I  
9 think it's page 29. It's the last page of

10 A. Yes.

11 Q. -- that exhibit. "In the event 23andMe goes through a  
12 business transition, such as a merger, acquisition, or sale of  
13 all or a portion of assets, your personal information will  
14 likely be among the assets transferred. In such a case, your  
15 information would remain subject to the promises made in any  
16 preexisting privacy statement." Is it possible for a consumer  
17 to infer that to mean with their explicit consent?

18 A. I -- I don't think so. But -- but even if they could,  
19 what you would more, I think, reasonably say is they've just  
20 given their explicit consent right here. In a business -- a  
21 business transaction, it may involve transferring my data.  
22 What I think that line is promising is that whoever acquires  
23 the data will be subject to the same privacy policy, which is  
24 what the Federal Trade Commission required in Toys Mart. And  
25 it's what's provided for in this agreement.



Fred Cate - Cross

1 Q. But I'm looking at this from a consumer's point of view.

2 You understand that --

3 A. Okay.

4 Q. -- we've now gone to the very last page of this privacy  
5 statement, where in two other places it says, the information  
6 will not be shared, sold, disclosed to any third-party without  
7 explicit consent. And then on the last page, there's a  
8 statement that your information will likely be/may be among  
9 the assets but are subject to the same promises in any  
10 preexisting privacy. You can acknowledge that at best there's  
11 conflicting statements. Well, I'm sorry. At worst, there's  
12 conflicting statements. At best, a consumer would not be  
13 clear as to what will happen if there is a merger or sale  
14 because there is conflicting information in these privacy  
15 statements?

16 A. I don't see that as conflicting at all, so I'm --

17 Q. Okay.

18 A. -- I'm certainly not acknowledging that. I would also  
19 say if we're --

20 Q. I'm sorry. I'm sorry to interrupt you. I'm sorry. From  
21 the aspect of a consumer was the question. I'm sorry.

22 MR. RECHER: Your Honor.

23 THE COURT: Yes. I'm going to allow Prof. Cate to  
24 finish his answer to that question.

25 MS. MILLIGAN: Thank you.



Fred Cate - Cross

1 A. All right. So I can go right on. From the aspect of  
2 consumer, virtually no one's reading all this anyway.

3 Q. Um-hum.

4 A. It's only lawyers who are reading this. And that's why  
5 the Federal Trade Commission has worked out so carefully with  
6 lawyers how this is done. This is done exactly like the  
7 Federal Trade Commission seems to like. Start with little  
8 statements. Move to more specific statements.

9 This is actually quite a tiny privacy policy. I mean,  
10 I -- I can remember the Federal Trade Commission bringing a  
11 case against I think it was Sears for making a disclosure or  
12 change on page 70-something of the policy. And they said,  
13 look, if you're going to do it that late, you've got to make  
14 it bigger type or something.

15 But this is page 8, 9. This doesn't seem that  
16 surprising. And moreover, it says, we're going to get your  
17 consent. And then it says, except if it's in a business  
18 transaction, in which case you've just given us your consent.  
19 It -- it --

20 Q. Okay.

21 A. -- seems clear and consistent with what federal  
22 regulators here would normally expect.

23 Q. All right. I'm sorry.

24 A. I'm done. Yes. You go ahead.

25 Q. Okay. I certainly don't mean to interrupt you. But that

Fred Cate - Cross

1 business -- what you're saying is individuals are consenting,  
2 when the statement that is there says, well, your personal  
3 information will likely be among the assets and that it will  
4 be subject to promises made in preexisting privacy statements.

5 A. Right.

6 Q. So why would they not potentially believe that any sale  
7 or merger would involve explicit consent? It does not say you  
8 are giving explicit consent to include your personal  
9 information in the assets transferred, correct?

10 A. It -- it doesn't say that in any paragraph.

11 Q. Okay. And so in the other paragraphs, it says, we will  
12 not sell your data without your explicit consent, correct?

13 A. Right.

14 Q. So this business transitions does not infer opt in  
15 consent to having their data moved. It says will likely be  
16 among.

17 A. Right. I -- I --

18 Q. I mean --

19 A. -- just disagree and --

20 Q. Okay.

21 A. -- I hope we'll part friends, despite my disagreeing.

22 But -- but when you sign something saying, I agree to submit  
23 my data, subject to this policy, if you're one of the people  
24 who read it and it said, by the way, if we go bankrupt, our  
25 data is going with us, I think you've agreed to that.

Fred Cate - Cross

1 Q. In the policies -- so in this policy, I think -- I want  
2 to make sure I have the date right. Second one. This is  
3 their binder. Okay. This one that we're looking at, I'm  
4 sorry, on the last page we were just talking about, it says,  
5 this privacy statement was last updated June 24th, 2010. So  
6 if a consumer was a one -- and 23andMe involves both research  
7 component --

8 A. Right.

9 Q. -- related to the genetic data, correct?

10 A. Right.

11 Q. And one time use of individuals seeking genetic  
12 information or report?

13 A. Right.

14 Q. Okay. And this, if someone signed this report, say, in  
15 August 2010 and read this privacy statement, which says in two  
16 places, we will not sell your data without explicit consent.  
17 Gets their results. Goes on about their life. Never checks  
18 the website. Never gets an email. Is it your position they  
19 would be bound by subsequent privacy policies, even without  
20 knowing that they're in existence?

21 A. Absolutely.

22 Q. Okay. And that is -- and if the person deceased, if they  
23 died, they would also -- their genetic data would still be  
24 subject to subsequent privacy policies, as they are passed --  
25 okay. Without consent. Without agreement. Without

Fred Cate -- Cross

1 acknowledgment.

2 A. Well, there -- there has been consent, and the Bankruptcy  
3 Code couldn't be clearer. We care about the privacy policy in  
4 place on the date as of the commencement of proceedings. So  
5 again, I think Congress has spoken here. There may be members  
6 of Congress who feel differently today, but -- but until they  
7 change the law, that remains the law, I think.

8 And in addition, it's not -- you know, in this case,  
9 there's going to be notice of the -- of the -- I mean, that's  
10 part of the TTAM. So I don't -- I don't see -- I mean, these  
11 are hypotheticals --

12 Q. Um-hum.

13 A. -- but they're not -- they're not what's happening here,  
14 since people will be notified, even if they haven't checked  
15 the privacy policy. And if they're deceased, if they have  
16 a -- a representative or someone handling their estate, they  
17 will be. And otherwise, what was in place will control.

18 Q. In a policy such as the one we're looking at, I think  
19 that the concern might be that the consumer, and I'm talking  
20 about a consumer that doesn't have your level of education and  
21 expertise, would conceivably be confused or unclear about the  
22 ability of a direct-to-genetic testing company to sell,  
23 transfer, or disclose their data with two statements made in  
24 each policy because there could be some confusion because of  
25 the abject statements that are made, we will not sell your

Fred Cate - Cross

1 data; is that correct?

2 A. I think there could always be confusion.

3 Q. Okay.

4 A. It's one reason why, again, people don't read privacy  
5 policies.

6 Q. I mean, even if they read the first page, the first  
7 sentence, it says, in many --

8 A. Right.

9 Q. -- of their policies, until I think maybe the one change  
10 in 2022 says, we will not sell your data without explicit  
11 consent so --

12 A. Right. But let's -- sorry, I shouldn't interrupt you.

13 Q. It's okay.

14 A. I apologize.

15 Q. Let me ask. A company such as 23andMe would be able to  
16 change their policy anytime up to a bankruptcy proceeding,  
17 correct?

18 A. That is correct.

19 Q. And a company could change their policy in a way that  
20 does not comply with federal nonbankruptcy law or state  
21 nonbankruptcy law. And if they did so, your opinion is that  
22 they would not -- it doesn't matter. That if the policy is  
23 consistent with what they're trying to do, that overrides  
24 federal and state law?

25 A. I -- I -- I just -- you added things there, and I just

Fred Cate - Cross

1 want to pull them out --

2 Q. Okay.

3 A. -- to make clear what I'm agreeing with. But I am --

4 Q. Um-hum.

5 A. -- I am agreeing.

6 Q. Um-hum.

7 A. So in other words, if a company changes its policy in a  
8 way that violates state law, the state can bring an action  
9 right then and there. There's -- there's nothing about  
10 bankruptcy that's relevant because bankruptcy's not on the  
11 table. The moment the company files for bankruptcy, what  
12 their policy says that day that has been disclosed to third  
13 parties that concerns sale of data to third parties, that is  
14 binding. And then it's too late for states to come in because  
15 Congress has made clear, for the moment -- it can change its  
16 mind, of course, but for the moment, that's the touchstone.  
17 It doesn't matter about consistency or any of that. I -- it  
18 might, to a reasonable person -- I don't mean to call Congress  
19 not reasonable, but it -- it doesn't matter to Congress.

20 Q. I'm glad you mentioned that. In front of you is a Texas  
21 binder. I think it says, "State of Texas Exhibits in Support  
22 of the State of Texas Objection".

23 A. Yes, it's here.

24 Q. Okay. Fantastic.

25 A. It's bigger than the other binder.



Fred Cate - Cross

1 Q. Well, we are from Texas so --

2 A. I understand.

3 Q. At exhibit -- it's called, and we called it in Tex G, so  
4 just so you know that it's Texas. We don't want to get any --  
5 there's TTAM and debtors. And so Tex.

6 A. Got it.

7 Q. Tex G is a transcript of the House Oversight and  
8 Government Reform Committee hearing. That is a public  
9 hearing. And this is a transcript of that public exchange,  
10 that public hearing. And you did not watch this hearing?

11 A. I did -- I did not.

12 Q. Okay. And to your knowledge, obviously not having  
13 watched it, the discussion point for these two, the House and  
14 the Senate committee, were related specifically to 23andMe,  
15 correct?

16 A. I don't know so --

17 Q. You don't know?

18 A. I didn't watch it so --

19 Q. Okay. Okay. And I think you said -- your comment is, I  
20 guess -- the reason I'm referencing this, and actually, Tex 8  
21 is the Senate transcript, that Congress is agreed. Congress  
22 posits that the law is correct. Congress believes that this  
23 transaction should be fine. But there are transcripts of the  
24 Senate and House hearings, where obviously there are concerns  
25 raised in consideration of the issues in this bankruptcy case



Fred Cate - Cross

1 involving the sale of this. Are you familiar with that at  
2 all?

3 MR. RECHER: Objection, Your Honor. One, I believe  
4 this document is not in evidence. Second, I believe the  
5 witness already testified he's not familiar with this  
6 particular proceeding. And to the extent counsel is  
7 questioning him about statements made in a congressional  
8 proceeding based on a transcript, that's obviously hearsay.  
9 So I would object for those reasons.

10 THE COURT: Well, the question was would it surprise  
11 the witness to learn this. I think that's a fair question.  
12 I'll overrule the objection.

13 MR. RECHER: Thank you, Your Honor.

14 A. It would not at all surprise me to learn that there are  
15 members of Congress concerned.

16 Q. Okay. I would like for you to please go back to the  
17 beginning of our binder. Our very large binder. I apologize.

18 A. Oh, so Tex binder? Okay.

19 Q. Yeah. Texas binder. And I'll represent the Tex A is a  
20 complete copy of the privacy policies in effect at different  
21 times in the history of 23andMe.

22 MS. MILLIGAN: Your Honor, I believe that almost all  
23 of these have already been admitted into evidence, with the  
24 exception of the policy -- that is 17? Which one is it?  
25 Number 18 in our exhibit book. And it is the policy that was,

Fred Cate - Cross

1 in effect -- policy that was, I guess, enacted in February  
2 28th of 2013. I think it was just inadvertently not included  
3 in the other exhibits. So I would ask that that policy be  
4 included as an exhibit and submitted into evidence.

5 THE COURT: Are you offering all these or --

6 MS. MILLIGAN: Well --

7 THE COURT: I'm a little unclear what --

8 MS. MILLIGAN: Here's the rub, Your Honor, and I  
9 don't want to inconvenience the Court. I believe all of these  
10 have already been admitted, except that one version of the  
11 privacy policy. I don't necessarily want to admit them all  
12 again --

13 THE COURT: Okay.

14 MS. MILLIGAN: -- and burden the Court with all of  
15 these copies, but if that is preferred.

16 THE COURT: So it's Tex A-18 --

17 MS. MILLIGAN: Yes, Your Honor.

18 THE COURT: -- that you're offering?

19 Any objection?

20 MS. MILLIGAN: No objection.

21 THE COURT: Okay.

22 MS. MILLIGAN: Thank you.

23 THE COURT: Tex A-18 will be admitted.

24 (2/28/2013 privacy policy was hereby received into evidence as  
25 State of Texas' Exhibit A-18, as of this date.)

Fred Cate - Cross

1 MS. MILLIGAN: Thank you. And otherwise, what I'll  
2 represent, just for ease and convenience, all of these have  
3 been admitted. But we just have them organized in a way  
4 that's according to a timeline. So if I can refer the debtor  
5 to these exhibit books, with the Court's permission --

6 THE COURT: For the witness --

7 MS. MILLIGAN: -- rather than going back to Ms.  
8 Vibbert's and like, using multiple exhibits already included.

9 THE COURT: As a general matter, I think that's fine.  
10 If there's some confusion, I'll certainly hear objection from  
11 the debtor, if anyone's confused about what we're talking  
12 about.

13 MS. MILLIGAN: Okay. And if we need to relate them  
14 to the Vibbert exhibits, we can certainly do that if there's  
15 any confusion.

16 BY MS. MILLIGAN:

17 Q. We are going to work backwards and start at Tex A-22. Do  
18 you see the top of the page? It says --

19 A. I do.

20 Q. -- privacy statement?

21 A. Yes. Thank you.

22 Q. You have summary. Personal information. Uses of  
23 information. Do you see those tabs?

24 A. Yes.

25 Q. The next to the last tab, under "Uses of Information",

Fred Cate - Cross

1 can you read that sentence?

2 A. "We will not release your personal information"; is that  
3 the one?

4 Q. Yes, sir.

5 A. "We will not release your personal information to any  
6 outside company without your explicit consent."

7 Q. Okay. And then if you would please turn the page. And  
8 the next page says, "Information Sharing and Disclosure". Do  
9 you see that page?

10 A. Yes, I see it.

11 Q. Under that section, there is a sentence that says,  
12 "23andMe will not release your personal information"; do you  
13 see that?

14 A. Yes, I do.

15 Q. Could you read that sentence for me or those two  
16 sentences?

17 A. 23 -- "23andMe will not release your personal information  
18 to any outside company without your explicit consent.

19 Q. Okay. If you turn the page, you'll see the last page of  
20 this privacy policy, and it will say, "Changes to This Privacy  
21 Statement"; do you see that?

22 A. I do.

23 Q. Okay.

24 A. The very last sentence of that reflects, "In addition,  
25 all customers will receive an email with notification of the

Fred Cate - Cross

1 changes." Do you know or have any knowledge of whether emails  
2 were actually sent to consumers with this updated privacy  
3 policy?

4 A. I do not, no.

5 Q. Okay. On the next, we'll go back to 21. Do you see  
6 "Privacy Highlights" page?

7 A. Yes, I do.

8 Q. Can you read the first sentence under the summary?

9 A. "Summary. 23andMe respects your privacy. 23andMe does  
10 not sell, lease, or rent your individual level personal  
11 information without explicit consent."

12 Q. Okay. And if you'll turn two pages over, the top  
13 paragraph subheading is "Web Beacons"; do you see that?

14 A. Yes, I do.

15 Q. And then a little bit lower down it says, "Information  
16 Disclosure"?

17 A. I see that.

18 Q. Okay. And that says, "As a general rule, 23andMe will  
19 not disclose your individual personal information to any  
20 third-party, except under the following circumstances." And  
21 what does the bottom bullet point say?

22 A. You have provided explicit consent for us to do so.

23 Q. Okay. Again, on the next page, "Changes to This Privacy  
24 Statement". The last sentence says that, "In addition, all  
25 customers will receive an email with notification of the

Fred Cate - Cross

1 changes." Again, you have no information as to whether that  
2 was actually emailed to customers?

3 A. I -- I -- I don't.

4 Q. Okay.

5 A. I would just say the paragraph actually begins, "When  
6 this privacy statement is changed in a material way".

7 Q. Okay. Let's go to item number 20.

8 THE COURT: Ms. Milligan, we're probably due for a  
9 recess --

10 MS. MILLIGAN: Sure.

11 THE COURT: -- sometime soon. Do you anticipate a  
12 bit more cross-examination, or are you --

13 MS. MILLIGAN: I do, Your Honor. Do you want to take  
14 a break and come back?

15 THE COURT: Okay. Why don't we do that? A fifteen-  
16 minute recess work for everyone?

17 MS. MILLIGAN: You bet. Thank you.

18 THE COURT: Okay. We'll resume at twenty after the  
19 hour. Thank you, everyone.

20 (Recess from 11:06 a.m. until 11:21 a.m.)

21 THE COURT: Be seated.

22 All right. Prof. Cate, you're still under oath.

23 THE WITNESS: Yes, sir.

24 THE COURT: Milligan, please continue.

25 MS. MILLIGAN: Thank you, Your Honor.

Fred Cate - Cross

1 RESUMED CROSS-EXAMINATION

2 BY MS. MILLIGAN:

3 Q. I think we had looked at Section 20. Is that where you  
4 are on your book?

5 A. I thought we had done 19, but --

6 Q. Oh, okay.

7 A. -- I'm totally --

8 Q. We'll go to 18 then. Don't want to make you repeat  
9 yourself. On under tab 18, "Privacy Highlights", can you read  
10 the first sentence under the summary?

11 A. "Summary. 23andMe respects your privacy. 23andMe does  
12 not sell, lease, or rent your individual level personal  
13 information without explicit consent."

14 Q. Okay. Great. Can you go to tab 17?

15 THE COURT: Go to where? I'm sorry.

16 MS. MILLIGAN: Tab 17. I'm sorry.

17 THE COURT: Oh, tab 17?

18 MS. MILLIGAN: Yes, I'm going sort of backwards --

19 THE COURT: Okay. Okay.

20 MS. MILLIGAN: -- because these are newest to oldest,  
21 and I'm going oldest to newest. I apologize for that  
22 confusion.

23 Q. All right. Can you read the first sentence under the  
24 summary?

25 A. "Summary. 23andMe respects your privacy. 23andMe does



Fred Cate - Cross

1 not sell, lease, or rent your individual level personal  
2 information without explicit consent."

3 Q. Okay. Did you --

4 MR. RECHER: Your Honor, if I could just object very  
5 briefly. Just given where we are in these proceedings, the  
6 documents in evidence, of course, say what they say. So I  
7 would object to this continued line on the grounds that it's  
8 cumulative.

9 THE COURT: Is there a dispute of fact about what the  
10 privacy policies say?

11 MS. MILLIGAN: In the pleadings that have been filed  
12 and the various documents filed, there has been a focus on one  
13 provision of these privacy policies and not the entirety of  
14 the privacy policy. And so we're working through to show  
15 these privacy statements are in almost all of the privacy  
16 policies of the debtor. And we wanted to just confirm that  
17 that is what it says with this witness.

18 THE COURT: Is there any dispute about that?

19 MR. RECHER: Your Honor, we can confirm that the  
20 privacy policies in evidence say what they say, and of course,  
21 counsel is free to argue based on the evidence. I'd just  
22 submit we don't need this witness to read all those documents.

23 THE COURT: Can we move on to other issues, and you  
24 can argue what they say, as counsel says accurately?

25 Q. Okay. And just to confirm, as far as what you reviewed



Fred Cate - Cross

1 in your preparation of your report, you looked at the current  
2 policy and one prior policy; is that right?

3 A. I -- I think I looked at all of the policies that the CPO  
4 cited.

5 Q. Okay.

6 A. But they're substantially similar, so I can't --

7 Q. Okay.

8 A. -- claim to have read every one in detail.

9 Q. Okay. Thank you. I just wanted to be clear because I  
10 think that what was in your binder was just those two, and I  
11 just wanted to make sure. Okay.

12 There was some discussion earlier about the privacy  
13 enhancements that the debtors are offering the consumers of  
14 all states, and then there are some enhancements that may be  
15 contingent on some other issues. And those enhancements  
16 include things like additional reviews or audits. Reports.  
17 Things like that. Many of those enhancements are already  
18 required under law, correct?

19 A. I -- I -- I don't know that many of those are. No.

20 Q. Okay. Do you know if the enhancements are things that  
21 the company is already doing? Did you compare the --

22 A. I -- I -- I don't know, no.

23 Q. Did you compare what 23andMe is currently doing as far as  
24 these privacy protections and what they're offering to do --  
25 TTAM is offering to do by this agreement?

Fred Cate - Cross

1 A. I did not.

2 Q. Okay. So you don't know if they're the same and they're  
3 just continuing a policy, or they're actually adding some  
4 enhancements?

5 A. I don't know.

6 Q. Okay. And if these enhancements are already required  
7 under Texas law and Texas law also requires separate express  
8 consent before the disclosure of genetic data, this  
9 transaction would not be a benefit to those Texas consumers;  
10 is that correct?

11 A. That is not true.

12 Q. If they have the -- if they have a property right in this  
13 genetic data and a requirement under Texas law that they give  
14 separate express consent and they already have all the other  
15 enhancements, it's --

16 A. That's not all the other enhancement enhancements. So --

17 Q. Okay.

18 A. -- for example, the Privacy Advisory Board. I don't know  
19 a thing about whether Texas law requires that or not, but  
20 that's certainly an enhancement. In addition, their  
21 nonprivacy enhancement. So for example, if they have a claim  
22 against 23andMe for data breach, having a solvent purchaser  
23 take over and be able to pay out that claim, that will be an  
24 advantage of this sale.

25 Q Do you have an opinion on whether the genetic data is

Fred Cate - Cross

1 inherently owned or property of the consumer who produced,  
2 say, genetic material, their saliva, their blood?

3 A I don't believe it's a relevant question because, like  
4 all questions of property rights, it really depends on what  
5 the rights are. So like, I own my home, but the utility  
6 company can trench a utility line across it anytime they want.  
7 And so ownership tells me absolutely nothing about what my  
8 rights are. What I have to know is actually what the specific  
9 set of rights or the bundle of sticks, as we like to teach in  
10 law school, are. And I don't know what those are in Texas.

11 Q Okay. Did you review any property law statutes for the  
12 different states in your analysis in formulation of your  
13 opinion?

14 A I -- I didn't. I once wrote a book chapter on property  
15 rights and data, and also on body parts, and other interesting  
16 things. But no, I did not.

17 Q And I just want to clarify. You indicated that -- I  
18 don't want to misstate your testimony, so please don't take  
19 this as an attempt to do so. But your testimony is that  
20 customers generally don't open emails if they're getting  
21 emails from a company like 23andMe. Is that what you said? I  
22 don't want to misstate what you testified to.

23 A It wasn't what I said. My --

24 Q. Okay.

25 A. My company -- my testimony was that it is very hard to

Fred Cate - Cross

1 prompt people to respond to emails.

2 Q. Okay.

3 A. And that is true even if the email offers something

4 wonderful, like, would you like to speak at our conference?

5 And three times later they're, like, would you please respond

6 to our email; would you like to speak at our conference? It's

7 not because I'm offended by the invitation to speak at the

8 conference; it's because I'm busy doing other things. So it's

9 very hard to get people who aren't already interested in the

10 thing.

11 Q And I think I heard you -- please, again, I'm not trying

12 to ask the same question; I just want to make sure I

13 understand it -- for that purpose, for that reason, or at

14 least part of that reason, often consent versus opt-out

15 consent are basically the same.

16 A. Exactly.

17 Q. Okay. And if a state law required opt-in, but the

18 company's policy doesn't reference that, that policy would be

19 in violation of state law, correct?

20 A Well, I don't -- I don't know. It depends on what the

21 state law required and if it -- does the state care about opt-

22 in, or does it care about a policy that says opt-in? So just

23 having a policy that didn't say opt-in might not violate it.

24 I just don't know, based on that question.

25 Q And I guess, in fairness, the transfer or disclosure, or

Fred Cate - Cross

1 whatever, would be the violation of state law if state law  
2 prohibited that --

3 A. And if --

4 Q. -- without express consent.

5 A. And if state law remained relevant in a proceeding such  
6 as this.

7 Q Okay. I may have asked this already too; I'm sorry. Are  
8 you familiar at all with the Texas Direct-to-Consumer Genetic  
9 Testing Act?

10 A I mean, I have -- I teach it in class, but I haven't read  
11 it for purposes of this case.

12 Q Okay. All right. So I'm impressed that you taught it in  
13 your class. I'll have to refer that back to my friends at the  
14 legislature. In your review of that, to the best of your  
15 recollection, understanding you didn't read it in preparation  
16 for this, that act actually grants an express property  
17 interest in and control over a person's genetic data by that  
18 person. Would you agree with that, to your knowledge?

19 A. I -- I -- I agree it says that.

20 Q. Okay.

21 A. It's --

22 Q. And --

23 A. Go ahead. I'm sorry.

24 Q. I'm sorry to interrupt you. That same statute also  
25 states that it cannot be transferred or disclosed without the

Fred Cate - Cross

1 individual's separate express consent. Are you familiar with  
2 that part of the act as well?

3 A Yes, I mean, generally.

4 MS. MILLIGAN: Sir, I thank you very much for your  
5 time. I think that's all the questions that we have. Thank  
6 you.

7 Pass the witness.

8 THE COURT: Thank you, Ms. Milligan.

9 Additional cross-examination?

10 All right. Before we go to redirect, I have what I  
11 think will be two questions. It's always dangerous to  
12 identify how many questions there are going to be for a lawyer  
13 or a judge.

14 Professor Cate, I think you said in the four cases  
15 where you've served as ombudsman, you did not have a clash  
16 between a privacy policy that said we may sell, and a law, a  
17 nonbankruptcy law, that said, or arguably said, you may not  
18 sell; is that right?

19 THE WITNESS: That is correct.

20 THE COURT: Are you familiar with a case in which  
21 that clash has arisen, where the privacy policy said we may,  
22 and the nonbankruptcy law said thou shalt not?

23 THE WITNESS: To be honest, I -- I'm not. It doesn't  
24 arise in the published literature very often. Someone may  
25 disagree. But in any event, because 363 is pretty clear about

Fred Cate - Cross

1 dismissing the role of nonbankruptcy laws. And so unless you  
2 have that third condition, where you have a CPO and then the  
3 CPO has to consider those laws, only then do you typically get  
4 something in a CPO report that makes it on the record.

5 THE COURT: Okay. Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: I limited it to two questions. Okay.

8 Redirect?

9 MR. HUNT: Your Honor?

10 THE COURT: Yes?

11 MR. HUNT: I'm sorry. Your Honor, I'm sorry to  
12 interrupt. I was deferring to those in the courtroom. I had  
13 a couple of questions, if that's okay.

14 THE COURT: Sure. Please proceed, Mr. Hunt.

15 MR. HUNT: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. HUNT:

18 Q. Prof. Cate, my name is Christopher Hunt, and I represent  
19 the Commonwealth of Kentucky. And I have just a few short  
20 questions for you. You indicated that you were present  
21 Wednesday for the hearing; is that correct?

22 A. Yes, sir.

23 Q. Were you present for Ms. Wojcicki's testimony?

24 A. I was.

25 Q. Okay. Have you had an opportunity to review the

Fred Cate - Cross

1 declaration that Ms. Wojcicki filed in this matter?

2 A. I have not.

3 Q. Okay. Would you agree with me that 23andMe, over the  
4 years that it has been in operation, has had multiple versions  
5 of its privacy policy?

6 A Well, I mean, for example, I have a binder here with  
7 twenty-something different versions, so yes, but there's a  
8 huge consistency among the terms over the years.

9 Q. I understand. But you would agree with me that that  
10 policy, in some regard, has changed multiple times over the  
11 years?

12 A. Again, I have to say, for the pieces I was looking at,  
13 you know, the question of sale, in connection with a  
14 reorganization or dissolution of assets, it's been 100 percent  
15 consistent over all the time. If there are other provisions  
16 that changed, I'm not in any way disputing you, I just am not  
17 aware of it.

18 Q Okay. So I'll go ahead and, at great possible risk, I  
19 will ask you to assume, for the purposes of my next question,  
20 that there have been some other material changes in the  
21 policies, whether they refer directly to the transfer of  
22 assets or a bankruptcy and so forth. So in this regard, to  
23 maybe put too fine a point on it, any change at all of any  
24 kind. If that is the case, do you have any -- did you find  
25 any evidence, or do you have any indication from your review,



Fred Cate - Cross

1 that the individual consumers negotiated those changes or were  
2 informed of those changes and had some opportunity to engage  
3 in a negotiation with 23andMe about whether those terms were  
4 acceptable?

5 A I don't know. In other words, if I don't know about the  
6 changes, I don't know about the way in which the purported --  
7 I mean, again, I'm not disagreeing with you -- but the  
8 asserted changes may have occurred or who was involved in  
9 agreeing to those. I'm sorry.

10 Q. Sure. So let me ask you -- I guess this counts as a  
11 hypothetical, which I try desperately to avoid, but I'll try  
12 it here. If you and I had entered into an agreement, and for  
13 the purposes of my question, the substance of the agreement,  
14 at least for my part, is immaterial, but you and I have a  
15 contract related to some topic. Would it be appropriate or  
16 legally enforceable for me to make a change to the terms of  
17 that contract and not obtain your consent?

18 A. Okay. I'm a law professor, so you know I'm going to say  
19 it depends. In other words, it depends on the words of the  
20 agreement. So if the agreement says we're going to shoot for  
21 a delivery date in July, but you can change the delivery date  
22 up to three months without notifying me, then it would be  
23 perfectly fine not to notify me. We've agreed that. If a  
24 privacy policy says we'll notify you of material changes but  
25 not of immaterial changes, then it would be fine to notify of

Fred Cate - Cross

1 only material changes. So I'm not -- I'm not trying to be  
2 difficult. It's just it would depend on the wording of the  
3 agreement. If you and I had an agreement to have lunch today,  
4 and you didn't show up, I would think you should have notified  
5 me.

6 Q. Okay. I understand the answer, and thank you for the law  
7 school flashback.

8 A. Sorry.

9 Q. All right. So you have testified before -- and I'll just  
10 refer to this generally and ask if you remember. You had made  
11 some comments, under some questioning, and if I understood you  
12 correctly, expressed a view that it was your opinion that,  
13 generally speaking, consumers have a negative reaction to  
14 multiple communications or requests from a company.

15 A. Yes, sir.

16 Q. Okay. To your knowledge, were any consumers ever  
17 contacted about the possibility of their assets being sold or  
18 otherwise transferred to an entity other than 23andMe?

19 A. I don't know if they were notified after they agreed to  
20 the privacy policy. I mean, the privacy policy explicitly  
21 discusses the possibility, but I don't know if there were  
22 communications after that.

23 Q. Okay. As I understood it, I was listening for a reason  
24 why attempting to satisfy an express consent requirement would  
25 be, for lack of a better word, problematic, or objectionable.

Fred Cate - Redirect

1 As I understand it, the answer that you provided was, other  
2 than the fact that you may annoy a consumer, is the  
3 possibility that someone may not respond to a request seeking  
4 express consent, and then later have regrets that their data  
5 had been deleted because they did not respond. Do I have that  
6 right?

7 A. Yes. I think both of those are true.

8 Q. Okay. But it is possible, in that scenario, that a  
9 consumer could simply resubmit a sample and have another test  
10 done, correct?

11 A. And presumably pay to be retested again, since I  
12 assume -- I don't know -- that there's a cost involved in  
13 testing.

14 Q. Correct. But in terms of the relationship, it's not  
15 fatal. In other words, that data could be recaptured,  
16 theoretically, in some fashion, in the unfortunate event of  
17 that scenario.

18 A. It is not fatal.

19 MR. HUNT: Excellent. That's all the questions I  
20 have. Thank you, Your Honor.

21 THE COURT: Thank you.

22 All right. Redirect?

23 REDIRECT EXAMINATION

24 BY MR. RECHER:

25 Q. Good morning. Still Good morning, Prof. Cate, maybe just



Fred Cate - Redirect

1     barely. I have a very small number of questions for you. You  
2     were shown, during cross-examination, Exhibit 27 to the  
3     Vibbert declaration, which is the privacy notice. The title  
4     is "Privacy notice for California Residents, last updated  
5     August 2 of 2022". Do you have that document?

6     A. It's not tabbed, I don't think. It's laid in the pages.

7     Q. It's page 320 of 332.

8     A. Thank you very much. Okay. Not in this binder.

9     Q I'd offer to supply you a new binder, but I think that  
10    would just make it worse.

11    A I think this is Texas because it's -- it's bigger. This  
12    is my binder. It wasn't in there.

13    Q. I'm told it may be in the Quinn Emanuel binder, tab 2.  
14    Do you have that binder?

15    A. Tab 2. This is the Vibbert --

16    Q. Yes, and it should be Exhibit 27 to that declaration.  
17    And it should say at the top, in the ribbon, page 320 of 332.

18    A. I have U.S. state residents. That's 24. So what am I  
19    looking for?

20           MR. RECHER: Could I approach?

21           THE COURT: Sure, certainly, please do.

22           THE WITNESS: Thank you.

23    Q Do you recall being shown Exhibit 27 during your cross-  
24    examination?

25    A. I do.

Fred Cate - Redirect

1 Q. And do you know that this particular policy was not in  
2 effect as of the petition date?

3 A. I do know that, yes.

4 Q. Okay. Well, let me ask you two things about it. I think  
5 you were shown, on direct, in the summary paragraph, the  
6 portion that discusses how this particular historical privacy  
7 notice supplements all privacy statements.

8 A. Yes.

9 Q. And you've reviewed the privacy statements; we talked  
10 about that on direct.

11 A. Yes.

12 Q. Okay. And could you turn to, I believe, the last page of  
13 the document, page 322 of 332?

14 A. Yes.

15 Q. And do you see the first full paragraph on that page,  
16 beneath the bullet, it says, "If you have given your explicit  
17 consent, for example, via a data transfer authorization or  
18 other consent document, we may share your personal information  
19 for commercial purposes". Do you see that?

20 A. I do.

21 Q. And you weren't shown that language during your cross-  
22 examination?

23 A. I was not.

24 Q. Okay. And you were also shown, during cross-examination,  
25 a series of historical privacy statements of the debtors,

Fred Cate - Redirect

1 right?

2 A. Yes.

3 Q. And we won't go back through them, but they had language  
4 in them to the effect of we won't share certain information  
5 absent explicit consent. Do you remember those documents?

6 A. Vividly.

7 Q. Okay. And just to be clear, every version of the privacy  
8 statement of the debtors you've reviewed contains a consent  
9 for the sharing or transfer of personal -- personally  
10 identifiable information in the case of business transitions  
11 or in the case of bankruptcy or reorganization; is that right?

12 A. It is right.

13 Q. Okay. And I believe I'm right, though I'm happy to be  
14 corrected by you, I don't believe anyone during cross-  
15 examination showed you or asked you about the privacy  
16 statement of the debtors that was actually in effect on the  
17 petition date; is that right?

18 A. I think that's correct.

19 Q. Okay. There were some questions from the State of Texas  
20 about whether, under your view, a debtor or a potential debtor  
21 could change the privacy statement on the eve of bankruptcy,  
22 or something to that effect. Do you recall those questions?

23 A. I do.

24 Q. Did that happen here?

25 A That did not.

Fred Cate - Recross

1 Q And is it the case, to your understanding, that the  
2 language, as to the transfer of personally identifiable  
3 information, in the case of a bankruptcy or other business  
4 transition, have been in the debtors' policies, in the form  
5 that it was in on the petition date, as of June 2022?

6 A. 2022, yes.

7 MR. RECHER: All right. No further questions. Thank  
8 you, sir.

9 THE COURT: All right. California, Texas, do you  
10 have recross as to my questions?

11 MR. NADAL: Yes, Your Honor.

12 THE COURT: Okay.

13 RECROSS-EXAMINATION

14 BY MR. NADAL:

15 Q. Good morning. You were just asked about Exhibit 27,  
16 correct?

17 A. Yes.

18 Q. And my colleague pointed you to, I believe, page 322 of  
19 332, the bottom portion where it says we may share with third  
20 parties.

21 A. Yes.

22 Q. Does that say anything about selling?

23 A. It does not, although it says for commercial purposes,  
24 which might be thought to imply sale.

25 Q. Does it say that we may sell?



Fred Cate - Recross

1 A. It does not.

2 Q. And then earlier on, I believe, the previous page, it  
3 says we do not sell your personal information. Now, forgive  
4 me, this says we may be the one that says we may sell your  
5 personal information to third parties, or is it the one that  
6 says we do not sell your personal information?

7 A. We do not sell your personal information.

8 Q. Thank you.

9 THE COURT: Ms. Milligan?

10 RECROSS-EXAMINATION

11 BY MS. MILLIGAN:

12 Q. Q The only question that I think that -- in response  
13 to the Court's questions regarding previous cases, I just want  
14 to clarify, you're not aware of any other case, or any case,  
15 where state law conflicted with the Bankruptcy Code and the  
16 sale was prohibited; is that the answer?

17 A. That is correct.

18 Q. Okay. Have you looked for any such case?

19 A I haven't looked specifically for where a sale was  
20 prohibited. I've looked for where reports were generated or  
21 the record reflected that there was a conflict and the court  
22 had to deal with it.

23 Q. Okay. Were you aware that there is actually an Eighth  
24 Circuit case related to this?

25 A. I am, yes.



Fred Cate - Recross

1 Q. Okay. Is that the In re Shower (ph.) case?

2 A. I think that's right.

3 Q. Is that right? Okay. And then I think there was also a  
4 First Circuit case involving a dairy farm. Are you familiar  
5 with that case?

6 A. Um-hum.

7 Q. Okay. And those two cases involved a situation where  
8 state law did not provide for the sale, and the Court  
9 considered that in its analysis of the approval of sale.

10 A. Right, but those cases involved a policy in place that  
11 itself would have questioned sale by the debtor.

12 MS. MILLIGAN: Okay. If the Court would like the  
13 cites, I'm happy to give them or not. Okay.

14 THE COURT: Let's save that for argument.

15 MS. MILLIGAN: Okay. Thank you.

16 THE COURT: All right. Mr. Cate, thank you. You may  
17 step down.

18 THE WITNESS: Ty.

19 MR. CLAREMAN: It's still good morning, Your Honor.  
20 Billy Clareman from Paul, Weiss, on behalf of the debtors.

21 Before we turn to our next witness, I'd actually like  
22 to press a couple of housekeeping matters.

23 THE COURT: Sure.

24 MR. CLAREMAN: So the first is, there's been some  
25 reference to the Jami Mills Vibbert's declaration and the

Fred Cate - Recross

1 exhibits thereto. The original declaration was filed at  
2 docket 777. All of the exhibits are in evidence. There was  
3 an objection to the text of that declaration. We've met and  
4 conferred. We've filed an amended declaration by docket Ms.  
5 Vibbert. It's at docket number 826. There's a reference to  
6 exhibits. Those are the same as in the original version of  
7 the declaration. And I'd like to offer docket number 826, the  
8 amended Vibbert declaration, into evidence.

9 THE COURT: All right. Is there any objection?

10 UNIDENTIFIED SPEAKER: No, Your Honor.

11 THE COURT: Okay. 826, the Vibbert declaration, will  
12 be admitted, with the understanding that it is paired with the  
13 exhibits that were attached to the previous version.  
14 (Jami Mills Vibbert's declaration was hereby received into  
15 evidence as of this date.)

16 MR. CLAREMAN: Thank you, Your Honor. I'd also like  
17 to offer into evidence the notice of winning bidder. This is  
18 at docket number 739, and the attachments thereto. It's on  
19 the debtors' exhibit list, Exhibit Number 7, as well as 7A  
20 through D, which are the attachments to the notes.

21 THE COURT: All right. Any objection to receipt of  
22 the notice of winning bidder into evidence?

23 All right. It'll be admitted.

24 (Notice of winning bidder was hereby received into evidence as  
25 Debtors' Exhibit 7, 7A-7D, as of this date.)

Peter Lefkowitz - Cross

1 MR. CLAREMAN: Your Honor, our next witness is Mr.  
2 Peter Lefkowitz. His declaration has been admitted into  
3 evidence at docket number 810. We have no direct live  
4 testimony for the witness. But Mr. Lefkowitz is available in  
5 the courtroom for cross-examination.

6 THE COURT: All right. Would anyone like to cross-  
7 examine Mr. Lefkowitz?

8 All right. Mr. Lefkowitz, please come forward and be  
9 sworn.

10 THE CLERK: Please raise your right hand. State your  
11 name for the record.

12 MR. LEFKOWITZ: Paul Lefkowitz.

13 (Witness sworn)

14 THE CLERK: Thank you. Please be seated and speak  
15 directly into the microphone.

16 CROSS-EXAMINATION

17 BY MR. NADAL:

18 Q. Good morning.

19 A. Good morning.

20 Q. Hi. My name is Daniel Nadal. I represent the People of  
21 the State of California. And I have a couple of questions for  
22 you about your declaration. In paragraph 8 of your  
23 declaration -- do you have a copy of that before you?

24 A. I do.

25 Q. All right. You state that customers consent to terms of

Peter Lefkowitz - Cross

1 service and privacy statement when they register.

2 A. Correct.

3 Q. And more specifically, you state that a customer checks a  
4 box confirming, "I have read and agreed to the terms of  
5 service in the privacy statement".

6 A. Correct.

7 Q. And then you augment this a little bit in paragraphs 18  
8 and 19. So paragraph 18 repeats paragraph A, a consumer  
9 checks the box.

10 A. Yes.

11 Q. And then in paragraph 19 you say there's a second  
12 acknowledgment and acceptance of the privacy statement.

13 A. Yes.

14 Q. So there's a two-step process. You check a box and you  
15 accept and continue. And this is important information for  
16 establishing that consumers agree to a privacy statement.

17 Q. All right. So a California customer who signs up and  
18 checks the box today, June 19th, 2025, is agreeing to the  
19 privacy statement displayed today.

20 A. I think Prof. Cate covered this. The person who signs up  
21 today is agreeing to the privacy statement that is in effect  
22 today, which includes provisions regarding how that may be  
23 amended over time.

24 Q. All right. And a California consumer who signs up and  
25 checks the box on March 31st 2024, is agreeing to the privacy

Peter Lefkowitz - Cross

1 statement displayed on that date.

2 A. Yes, they're agreeing to the privacy policy that's  
3 displayed on that date that includes specific terms concerning  
4 the possibility of change over time.

5 Q And a California customer who signs up and checks the box  
6 on March 31st, 2023 is agreeing to the privacy statement  
7 displayed on that day?

8 A. Same answer.

9 Q. All right. And this goes back each year --

10 A. Yes.

11 Q. -- March 31st, 2022 --

12 A. Yes.

13 Q. -- March 31st, 2021.

14 A. That's -- that's --

15 Q. And that goes all the way back to the very first customer  
16 who signed up.

17 A. All the way back. So the very first customer that signed  
18 up, in 2007 or 2008, is agreeing that the policy may be  
19 changed over time; that's right.

20 Q. Paragraph 11, you refer to "the privacy statement also  
21 contains provisions that are specific to residents of certain  
22 U.S. states and foreign countries which are designed to comply  
23 with laws specific to those jurisdictions". Do you see that?

24 A. Yes, I do.

25 Q. Does 23andMe meet the U.S. states' policy as a separate

Peter Lefkowitz - Cross

1 privacy policy or as part of the privacy statement?

2 A. It is part of the privacy statement.

3 Q. And I'd also like to confirm that 23andMe designed these  
4 privacy policies to comply with laws in specific  
5 jurisdictions.

6 A. Correct.

7 Q. And that would include California law?

8 A. Yes.

9 Q. Now, if 23andMe's privacy policy did not comply with  
10 California law in some way, is it your understanding that the  
11 company would follow California law, or would it follow its  
12 privacy statement?

13 A. Well, the -- the privacy policies are designed to follow  
14 the law.

15 Q. Yes, but if there is a conflict between the two, which  
16 one would 23andMe follow?

17 A. Well, the -- the company will always follow its privacy  
18 statement. If the state has a problem with the way in which  
19 the privacy statement complies with state law, they have my  
20 number.

21 Q. And if there were a term in the privacy policy that  
22 didn't comply with California law, would the company enforce  
23 that term against a California consumer?

24 A. As I said, you know, my job, as the privacy officer, is  
25 to draft policies and make sure that the policies comply. If

Peter Lefkowitz - Cross

1 a state feels that there is something improper, inaccurate,  
2 illegal in that policy, they will let us know.

3 Q. All right. If a California customer files a lawsuit  
4 against the company, based on terms in the privacy policy not  
5 compliant with California law, would 23andMe argue that the  
6 privacy statement controlled over California law?

7 MR. CLAREMAN: Objection, Your Honor. I think these  
8 are inappropriate --

9 THE CLERK: You need to be at the podium, sir.

10 THE COURT: Sorry. Grab one of the two mics here,  
11 yes.

12 MR. CLAREMAN: Objection, Your Honor. I think these  
13 are inappropriate hypothetical questions for a fact witness.  
14 Calls for speculation.

15 THE COURT: I'll let this go for a little bit because  
16 he is the chief privacy officer. So I'll allow this question.

17 A So to recount your question, if a consumer sued, claiming  
18 that the privacy policy violated state law, we would -- as we  
19 do with any legal matter, we would evaluate to determine  
20 whether we agreed with the consumer.

21 Q. And that's because, as the data privacy officer, and a  
22 former chief digital risk officer, chief security and trust  
23 officer, you know that violating the states' privacy law could  
24 potentially carry with it some serious liabilities.

25 A. It is a bad thing.



Peter Lefkowitz - Cross

1 Q. A bad thing to do?

2 A. Yes.

3 Q. Do you have an estimate about what the penalties are for  
4 each violation?

5 A. I -- I don't recall what it is under California law.

6 Q. Do you have any idea of any law?

7 A. I -- I recall, from my preparation for this testimony,  
8 that one of the laws I looked at -- it may have been the Texas  
9 genetics law -- had a 2,500 dollar per violation. But -- but  
10 again, there are a lot of laws we're dealing with.

11 Q. Understood. I'm going to turn to paragraph 13. I'm sure  
12 you won't be surprised, but I want to talk about your use of  
13 the word "current". Earlier, we talked about how, when a  
14 customer signs up, they view -- and I think, in your view,  
15 check a box agreeing to the then current privacy policy.

16 A. As -- as I've answered, they're agreeing to the then  
17 current privacy policy as may be amended over time.

18 Q. Now, would 23andMe send notices to consumers that the  
19 terms were changing?

20 A. As we state in the privacy policy, if there is a material  
21 change, as determined by the company, it would send a notice  
22 to the customers.

23 Q. And how did those notices get transmitted to the  
24 customers?

25 A. Well, so just to -- to clarify, I first joined the



Peter Lefkowitz - Cross

1 company in February of 2024. So I cannot speak to what  
2 previous privacy officers may have done. But if there was a  
3 statement in the privacy policy that there we would inform  
4 you, there were various methods to let people now. If it says  
5 that we would email you, we would email.

6 Q. So did you review the former privacy officer's work?

7 A. It depended upon the topic and what was happening at the  
8 time. I did not go back through binders of everything that  
9 every privacy officer has done in the history of the company.

10 Q. Did you review -- but I understand your testimony that  
11 you didn't look and see if 23andMe sent notices out to  
12 consumers.

13 A. I have not gone back through each change to the privacy  
14 policy since 2007 to determine whether or not notices were  
15 sent.

16 Q. All right. So you have a looked at any of those notices?

17 A. No, that's not what I said.

18 Q. All right.

19 A. I have not looked to determine whether or not, in each  
20 case of a change to the privacy policy, a notice was sent.

21 Q. Did you review any notices that were sent to any  
22 consumer?

23 A. I have not looked at any notices that have been sent to  
24 consumers.

25 Q. Would you -- based upon what you know about how 23andMe



Peter Lefkowitz - Cross

1 operates and what the privacy statements say, would any of  
2 these notices to consumers or customers have that two-step  
3 process that we talked about?

4 A. I'm sorry; what is the two-step process?

5 Q. Check a box, agree and acknowledge.

6 A. That's not called for in the privacy statement.

7 Q. Did any of the notices to consumers have that two-step  
8 process?

9 A. Not to my knowledge.

10 Q. Did 23andMe track how many consumers read emails that  
11 were sent to them?

12 A. Not to my knowledge.

13 Q. Were you here on Wednesday when Ms. Wojcicki -- excuse me  
14 for the pronunciation -- commented about the read rate on  
15 emails?

16 A. Yes.

17 Q. Do you recall what she said it was?

18 A. I don't recall.

19 Q. All right. If Ms. Wojcicki has an understanding as to  
20 the read rate of consumers to 23andMe emails, does 23andMe  
21 somehow track if consumers read the emails?

22 A. Again, I can only speak to my personal knowledge. I'm  
23 not aware of -- I have not been informed of the company having  
24 tracking on the exact percentage of customers that have read  
25 emails that have gone in.

Peter Lefkowitz - Cross

1 Q. All right. And as someone who works in the privacy  
2 sphere, you know that companies have ways to track if  
3 consumers open emails?

4 A. Yes. Depending upon circumstances, yes.

5 Q. All right. Did 23andMe --

6 A. There are technologies available.

7 Q. Yes. And you don't know if 23andMe did that?

8 A. I don't.

9 Q. Did 23andMe keep track of which privacy policy applied to  
10 which consumer?

11 A. I -- I think I've answered that. The privacy policy that  
12 is posted at any moment is the privacy policy that applies.

13 Q. All right. Are you aware of GDPR requirements?

14 A. Yes.

15 Q. That 23andMe tracking was subject to GDPR?

16 A. The residents of the -- of the twenty-seven member  
17 states.

18 Q. So 23andMe tracked who was subject to the GDPR and the  
19 specific GDPR privacy policy?

20 A. Well, let -- let me just clarify with respect to  
21 "tracked". 23andMe has a European privacy notice. It's GDPR,  
22 UK, Switzerland -- I forget if there are any other countries  
23 covered in there, because their laws are substantially  
24 similar. That is just like the U.S. resident notice that  
25 provides particular terms and particular language that are --

Peter Lefkowitz - Cross

1 that are -- are appropriate to those jurisdictions.

2 Do we track, in the sense that every time a customer  
3 comes in, we're doing a reverse IP lookup? No. Do we know  
4 that we have customers throughout the European Union? Yes.

5 Q. Does 23andMe know which customers are subject to GDPR?

6 A. We know the addresses that customers have given to us  
7 when they've signed up. I don't want to give the impression,  
8 though, that every time somebody comes to 23andMe.com, that  
9 they're coming in from France or Germany.

10 Q. Understood. And if I told you that the UK was also in  
11 the privacy statement, would you agree with me?

12 A. No, UK is in that privacy statement. I was just making a  
13 clarification, following Brexit, UK is not in the EU.

14 Q. Understood. So did 23andMe keep track of when registered  
15 customers logged into the website?

16 A. I believe that the company has a log of every access to  
17 the website. That's important, from a security perspective.

18 Q. Does it go back beyond just the most recent access?

19 A. I don't recall the exact logging history of the company.  
20 The company follows NIST guidelines on logging, which I  
21 believe is thirteen months.

22 Q. Understood.

23 A. But that is -- that is my knowledge of the policy base of  
24 the company. I have not inquired of the security team exactly  
25 as to exactly how long logging is used and for which purposes.

Peter Lefkowitz - Cross

1 Q. Do you know how many consumers have not logged in, in the  
2 past three years?

3 A. I don't.

4 Q. All right. Does 23andMe just have some one-time users?

5 A. I presume they do.

6 Q. Does 23andMe have customers who are incapacitated  
7 currently?

8 A. I presume they do.

9 Q. Does 23andMe have customers who are deceased currently?

10 A. I presume they do.

11 Q. All right. Now I want to jump forward for a minute to  
12 paragraph 27.

13 A. Okay.

14 Q. You mentioned 23andMe's website, and you say that  
15 23andMe's privacy website contains information related to  
16 privacy and various links.

17 A. Yes.

18 Q. And footnote 27 contains the link to "Your privacy comes  
19 first".

20 A. Footnote 27, yes.

21 Q. Now, you didn't include that website as an exhibit, did  
22 you?

23 A. No, but I believe you did.

24 Q. Yes, and we'll --

25 A. We received it last night.



Peter Lefkowitz - Cross

1 MR. NADAL: Your Honor, may I approach the witness?

2 THE COURT: Yes.

3 THE WITNESS: Thank you.

4 Q. I just handed you what is docketed as ECF 825. Do you  
5 see that?

6 A. Yes.

7 Q. All right. I would like you to turn to Exhibit CA-2.

8 A. Okay.

9 Q. Do you see the title of the page on there?

10 A. I do.

11 Q. Does it look familiar?

12 A. Yes, it does.

13 Q. All right. Is that the "Your privacy comes first" page?

14 A. I believe it is.

15 MR. NADAL: All right. Your Honor, I would move to  
16 move that CA-2 be admitted into evidence.

17 THE COURT: Any objection?

18 UNIDENTIFIED SPEAKER: No objection.

19 THE COURT: No objection. CA-2 is admitted.

20 ("Your privacy comes first" page was hereby received into  
21 evidence as State of California's Exhibit CA-2, as of this  
22 date.)

23 Q All right. Now, when you look at ECF, page 7 of 10, or  
24 the website display page 6 of 9, the company says it would  
25 love if consumers dove deeper into their privacy, correct?

Peter Lefkowitz - Cross

1 A. I'm sorry. Repeat that, please.

2 Q. Sure. ECF page 7 of 10, or if you're looking at the  
3 bottom, the website displays page 6 of 9.

4 A. I don't -- I don't see either of those. I'm sorry. I  
5 see 3 of 10, 4 of 10, 5 of 10 at the very top of the page. If  
6 you could point me to one of those, that would be very  
7 helpful.

8 Q. Yes. One second.

9 THE COURT: So are we looking at 825-2?

10 MR. NADAL: Yes, Your Honor.

11 Q Does it read doc 825-2 at the top?

12 A. 825-2, yes.

13 Q. All right.

14 A. Or if you could just tell me what's at the top of the  
15 page, then I can --

16 Q. Yes, and I'm --

17 A. -- follow you.

18 Q. -- working on that. If we can go to ECF 825-2, page 7 of  
19 10.

20 A. Okay.

21 Q. And I'm looking at it right here. Do you see that bold  
22 text in the middle?

23 A. "Want to know even more"?

24 Q. Yes. And then you see the sentence starting with, "But  
25 we also understand that you may want to dive even deeper into

Peter Lefkowitz - Cross

1 the details, and we love that".

2 A. Yes.

3 Q. Do you see that?

4 A. Yes.

5 Q. And then there's a number of arrow bullet points. And  
6 near the bottom there's a blog series on privacy; do you see  
7 that?

8 A. Yeah. Yeah.

9 Q. Did 23andMe maintain a blog series on piracy?

10 A. Prior to my being at the company, they had some blogs on  
11 privacy.

12 Q. All right. I understand. Now I'd like you to turn to  
13 Exhibit CA-1.

14 A. Okay. I'm with you.

15 Q. All right. This is a 23andMe blog post about the passage  
16 of California genetic testing, correct?

17 A. Yes.

18 Q. All right. Have you read this before?

19 A. Yes, last night.

20 Q. Oh, you did. Excellent.

21 MR. NADAL: Your Honor, I would move to introduce CA-  
22 1.

23 THE COURT: Any objection?

24 UNIDENTIFIED SPEAKER: No objection.

25 THE COURT: CA-1 will be admitted.



Peter Lefkowitz - Cross

1 (23andMe blog post about the passage of California genetic  
2 testing was hereby received into evidence as State of  
3 California's Exhibit CA-1, as of this date.)

4 Q All right. Would this be one of the things that the  
5 company would love if consumers who dove deeper into privacy  
6 read?

7 A. Well, I don't even know how to answer that. It's a blog  
8 that the -- the materials in CA-2 say we'd love for you to  
9 learn more, and it points to blogs. So if what you're saying  
10 is the company would love consumers to know about their blogs,  
11 sure, they'd love them to know about their blogs.

12 Q. Do you dispute that, if you click the blog link, it will  
13 get you to this page eventually?

14 A. I -- I'll take your word for it.

15 Q. Because I have CA-3 if you wanted to do that.

16 A. No, that's fine. I'm not --

17 Q. Okay. Okay.

18 A. I'm not contesting it.

19 Q. All right. Now, in this blog post 23andMe discusses how  
20 it worked hard to have GIPA happen. Second full paragraph --

21 A. Yes, I understand.

22 Q. Yes?

23 A. Yes.

24 Q. And 23andMe hopes that California's Genetic Information  
25 Privacy Act would be a model for genetic privacy legislation

Peter Lefkowitz - Cross

1 nationally.

2 A. Yes.

3 Q. All right. And 23andMe characterized the law as  
4 including many of the same protections that 23andMe has long  
5 offered its consumers, including -- bullet point -- "requiring  
6 separate express consent for genetic data to be" -- second  
7 bullet point -- "shared with a third party". Do you see that?

8 A. Yes.

9 Q. And is this statement of a company something that the  
10 company would love if consumers who dove in deeper read?

11 A. Again, the -- the materials at CA-2 say we'd love you  
12 to -- to see our blogs. This is stated within a blog.

13 Q. Understood.

14 A. And that's about as far as I'll go on that.

15 Q. Understood. Let's turn the paragraph 13 of your  
16 declaration.

17 A. Yes.

18 Q. You represent that the current privacy statement, and all  
19 prior versions --

20 A. Yes.

21 Q. -- -- contained language advising customers that there  
22 can be a change in ownership, correct?

23 A. Yes.

24 Q. Now, does the U.S. States Privacy Notice say that?

25 A. The privacy statement, which includes the U.S. Privacy

Peter Lefkowitz - Cross

1 Notice, states that.

2 Q. What is your understanding -- all right. Let's go to  
3 your Exhibit N, page 144. Or if you'd like, I will represent  
4 that this is the same -- no, let's just do your Exhibit N.

5 A. Okay.

6 Q. Does this say "Privacy notice for U.S. state residents"?

7 A. Yes.

8 Q. I want to make sure we're looking at the same thing. It  
9 says, "Last updated as March 15th, 2024".

10 A. Yes.

11 Q All right. And --

12 THE COURT: What's the ECF page number, please?

13 MR. NADAL: It's docket number 774, ECF page 144.

14 THE COURT: 144, thank you.

15 A. Thank you.

16 Q Looking at the second paragraph, can you confirm for me  
17 that it says that it applies to residents of California?

18 A. Yes.

19 Q. And the fourth full paragraph, last sentence, says, "This  
20 notice makes sure we cover state specific requirements. In  
21 the event of any conflict between the terms of this notice and  
22 the privacy statement, the terms of this notice prevail."

23 A. Yes.

24 Q. Now, do you see the bullet point list lead-in with,  
25 "Here's a summary before we dive into the details"?

Peter Lefkowitz - Cross

1 A. Yes.

2 Q. And the first bullet point says, "You have the right to  
3 opt out of the sale or sharing of your personal information  
4 with a third party"?

5 A Yes.

6 Q All right. Let's look past this summary. Can you move  
7 down to the "Your rights" section at the bottom of the page?

8 A Yes.

9 Q And if you're going to look at the list of privacy  
10 rights, and then it says, "You have the right to", and then  
11 down at the sixth bullet point, it says "opt out of the sale  
12 or sharing of your personal information with third parties".

13 A Yes.

14 Q This wasn't the only state specific privacy policy, was  
15 it?

16 A This is the U.S. state resident privacy policy that is in  
17 effect. So I don't know --

18 Q. That's the one that --

19 A. I don't know -- I mean, I -- I'm sorry, I'm a little bit  
20 confused by your question. This is the U.S. state resident  
21 policy that is in effect.

22 Q Correct. And there are historical versions of this  
23 privacy policy.

24 A Yes.

25 Q All right. I don't want to rush you on this next part;

Peter Lefkowitz - Cross

1 I just want to be a little efficient. I'd like for you to  
2 turn to -- it was previously the Jami Vibbert declaration  
3 binder, but I believe it's Quinn Emanuel, tab 2.

4 A Quinn Emanuel, tab 2. Okay. Let me get the tab 2.  
5 Okay.

6 UNIDENTIFIED SPEAKER: Sorry, Your Honor. I just  
7 want to make sure I have what Mr. Nadal --

8 Q Again, much thanks to our colleagues at Quinn Emanuel.  
9 Can you open to Exhibit 23 at ECF page 286?

10 A Okay.

11 Q This is the U.S. States' Privacy Notice, last updated  
12 March 15, 2024.

13 A Which appears to be the same exact document we were just  
14 looking at.

15 Q How did you guess my next question? All right. So we  
16 already discussed this one. Let's look back to Exhibit 24,  
17 which is -- or move forward to Exhibit 24, which is page 296.

18 A Okay.

19 Q Turn to the next page which actually displays the privacy  
20 notice. This is the U.S. States Privacy Notice, last updated  
21 June 2nd, 2023.

22 A Okay.

23 Q It applies to residents from California.

24 A Is that a question?

25 Q Yes.

Peter Lefkowitz - Cross

1 A. Yes.

2 Q And the summary, again, states that you have the right to  
3 opt out of a sale or share any of your personal information  
4 with a third party.

5 A Yes.

6 Q And turn to page 298. Then nonsummary privacy rights --  
7 sorry. It was, I think, the next page.

8 A The next page. Got it.

9 Q Page 298, which is the nonsummary version of the privacy  
10 rights, it again says you can opt out of sale or sharing of  
11 your personal information with third parties.

12 A Yes.

13 Q All right. Let's turn to Exhibit 25, which is at page  
14 305. Again, that's the exhibit page.

15 A Yes.

16 Q This is the U.S. States' Privacy Notice, effective March  
17 30th, 2022, correct?

18 A No, it's March 30th, 2023, unless I'm looking at the  
19 wrong page. Page 306?

20 Q Yes. All right. So it's March 30th, 2023?

21 A That's what it says here.

22 Q I apologize. All right. But this applies to California  
23 residents?

24 A Yes.

25 Q And it also says, in the event of a conflict, that these

Peter Lefkowitz - Cross

1 terms control.

2 A Yes.

3 Q And the summary says that California residents have a  
4 right to opt out of sale?

5 A Yes.

6 Q And then on the next page, the actual statement of  
7 privacy rights includes the right to opt out of a sale.

8 A And you're looking -- yes.

9 Q All right. Turn to, I believe, now Exhibit 26, page 313.

10 A Okay.

11 MR. CLAREMAN: If I may, in the interest of  
12 efficiency, we can stipulate that the documents say what they  
13 say, I think similar to before. I don't want to step on Mr.  
14 Nadal's cross, but the documents are in evidence. And if  
15 we're just reading the documents, then we can stipulate that  
16 the words are the words.

17 THE COURT: I think that should take care of this,  
18 unless there's a twist coming, Mr. Nadal.

19 MR. NADAL: There is, Your Honor.

20 THE COURT: Can we go to the twist?

21 MR. NADAL: Potentially. I'm not sure.

22 Q. But I think we can all agree that Exhibit 26 says the  
23 exact same thing.

24 A It either says the exact same thing or something  
25 substantially similar.

Peter Lefkowitz - Cross

1 Q All right. Let's turn to Exhibit 27 at page 319. And  
2 this one, it's a little different. This is the privacy notice  
3 for California residents.

4 A Right.

5 Q Last updated August 2nd, 2022.

6 A Correct.

7 Q The summary section says, "Here is a summary before we  
8 dive into the details". And the first bullet point has  
9 language that says, "But rest assured we do not sell your  
10 personal information".

11 A It says that.

12 Q Same page, at the very bottom, which is, I believe, in  
13 the actual statement of privacy, says, "23andMe does not sell  
14 personal information to third parties".

15 A Yes.

16 Q All right. Let's turn to Exhibit 28. This is page 324.  
17 This is the privacy notice for California residents?

18 A Yes.

19 Q Effective date is January 1st, 2020?

20 A Yes.

21 Q At the bottom of the page it says "Consumer rights"?

22 A Yes.

23 Q And then next page, the third bullet point says "opt out  
24 of sales"?

25 A I'm sorry, I don't see that on this --



Peter Lefkowitz - Cross

1 Q. Sorry. This is page 326.

2 A Oh, number three.

3 Q. Yes, number three.

4 A. Opt out of sales, yes.

5 Q. Do you see that?

6 A Yes.

7 Q Does it say, "23andMe does not sell personal information  
8 to third parties"?

9 A It says the CCPA provides you the right to opt out of  
10 having your personal information sold by a business.

11 Q And what is the next sentence?

12 A "23andMe does not sell personal information to third  
13 parties".

14 Q All right. So from January 1st, 2020, to December 13th,  
15 2022, 23andMe's privacy statement for California residents  
16 said that 23andMe does not sell California consumers' personal  
17 information.

18 A To third parties, yes.

19 Q And when California residents went through the two-step  
20 process to sign up, they were agreeing to this.

21 A Yes.

22 Q All right. And then from December 14th, 2022, to  
23 present, 23andMe's privacy statement for California residents  
24 said that 23andMe would provide notice and an opt-out right.

25 Q What document are you referring to?

Peter Lefkowitz - Cross

1 A Sorry. The December 14th one starts at Exhibit 26.

2 That's the one that we actually skipped over. I'll represent  
3 to you that December 14th, 2022, Exhibit 26, is the first time  
4 that it changes to "right to opt out".

5 A. Okay.

6 Q. If that's correct, from December 14th, 2022, to present,  
7 the privacy statement for California residents, that they  
8 checked a box and acknowledged and confirmed, said that  
9 23andMe would provide notice and an opt out right, correct?

10 A Where are you looking in the document?

11 Q. Sure. Exhibit 26, page 313. If you look at the -- so  
12 there's the summary which says you have a right to opt out of  
13 sale.

14 A Notice of right to opt out of sale?

15 Q Yes. And then on the next page, the actual statement of  
16 privacy rights, it includes the right to opt out.

17 A Okay.

18 Q And then the ones going to the present all said the same  
19 thing.

20 A Okay.

21 Q So from December 14th '22, to present, California  
22 residents who checked the box, and acknowledged and agreed to  
23 the privacy statement, were told that 23andMe would provide  
24 them notice and an opt-out right.

25 A Yes.

Peter Lefkowitz - Cross

1 Q How many customers does 23andMe have now?

2 A I believe currently approximately thirteen million.

3 Q All right. How many customers did 23andMe have before  
4 the filing of this bankruptcy petition?

5 A Approximately fifteen million.

6 Q And what was the highest number of customers that 23andMe  
7 has had?

8 A I don't know.

9 Q All right. Do you know how many customers 23andMe had as  
10 of March 31st, 2022?

11 A I do not.

12 Q All right. 23andMe was publicly traded?

13 A Yes.

14 Q And as part of that, 23andMe filed various forms and  
15 reports with the United States Securities and Exchange  
16 Commission?

17 A That is what public companies do.

18 Q Yes. Can you turn to California-4?

19 A Yes.

20 Q And can you look at the top and tell me what this appears  
21 to be?

22 A It's a 10-K, Form 10-K --

23 Q. What --

24 A. For the -- for the year March 31st, 2022.

25 MR. NADAL: All right. Your Honor, I'd move to have

Peter Lefkowitz - Cross

1 CA-4 admitted into evidence.

2 THE COURT: Any objection?

3 MR. CLAREMAN: No objection.

4 THE COURT: CA-4 is admitted.

5 (March 31, 2022 Form 10-K was hereby received into evidence as  
6 State of California's Exhibit CA-4, as of this date.)

7 Q All right. We'll keep this short, and I think we'll be  
8 done in maybe two more questions. I want you to go down to  
9 page 5 of the report, but it's designated ECF, page 11 of 185.

10 A Okay.

11 Q Do you see "Market opportunity consumer"?

12 A I do.

13 Q And the last paragraph says, "As of March 31st, 2022, we  
14 had approximately 12.8 million customers"?

15 A Yes.

16 Q Any reason to dispute that?

17 A No.

18 Q All right. And then if you could flip forward to page  
19 9 -- sorry -- back to page 98 of 185, which is report page 92.

20 A Report page?

21 Q Report page 92.

22 A Okay. I'm with you.

23 Q All right. The very last line on the page. It repeats  
24 the 12.8 million number for March 31st, 2022?

25 A Yes.

Peter Lefkowitz - Cross

1 Q And then it adds that there were 11.3 million as of March  
2 31st, 2021.

3 A Yes.

4 MR. NADAL: No further questions, Your Honor.

5 THE COURT: Further cross?

6 MS. EICHELE: Yes, Your Honor. Elizabeth Eichele  
7 here.

8 THE COURT: Hold on, hold on. Cross in the  
9 courtroom, please. Ms. Milligan has the lectern.

10 MS. MILLIGAN: Thank you.

11 MS. EICHELE: Oh, sorry. Sorry.

12 MS. MILLIGAN: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. MILLIGAN:

15 Q. Good afternoon. I think I'm the first to be able to say  
16 good afternoon. My name is Layla Milligan. I'm appearing on  
17 behalf of the State of Texas. I just have a few follow up  
18 questions for you --

19 A. You bet.

20 Q. -- if I may.

21 Q. A few technical data privacy questions. Do you know how  
22 many Texas customers 23andMe has currently?

23 A My understanding is there's something on the order of  
24 835,000.

25 Q. Do you know --

Peter Lefkowitz - Cross

1 A. Is that correct? Did I give the right answer there?

2 Q I don't know, but I'll defer to your knowledge. Do you  
3 know how many of those Texas consumers have consented to  
4 having their data be included in third-party research?

5 A I don't know exactly, but I do know that across the  
6 company, and generally by region, it's over eighty percent.

7 Q Okay. So there's a good chance that the 835,000 Texans  
8 of that eighty percent --

9 A And it's somewhere -- somewhere in the range of 650- if  
10 my -- you know, if my brain is operating fast enough, yeah.

11 Q Fantastic. You mentioned that 23andMe does not track  
12 when an email is opened by a consumer or a customer?

13 A No, I -- I didn't say that. I'm saying --

14 Q. I'm sorry.

15 A. -- I'm not a member of the security department, and I  
16 don't know exactly what -- I was a security officer in a prior  
17 life. I know the level of tracking and security controls that  
18 can be used. I don't know exactly what's used in the case of  
19 23andMe's security group.

20 Q Okay. Do you have any affiliation with that security  
21 group, or they're totally separate from what you do?

22 A As the privacy officer, I have a pretty close affiliation  
23 with the security group, yes.

24 Q Okay. But you don't have personal knowledge as to --

25 A I don't have personal knowledge of the question you just

Peter Lefkowitz - Cross

1 asked.

2 Q Okay. Do you have knowledge of whether 23andMe retains  
3 information related to emails sent for marketing purposes?

4 A I'm sure some information is kept. I can't tell you the  
5 exact parameters.

6 Q I'm going to go to your statement. In your statement, at  
7 paragraph 17 -- and I'm sorry, do you have it open? It  
8 starts, "Every iteration of the privacy statement".

9 A Yes.

10 Q You have "sale" in quotation marks. What does that mean?

11 A Well, if you don't mind, I'm just going to go to the most  
12 recent privacy statement. Give me just a moment, if you don't  
13 mind. So there are -- there are essentially two types of  
14 provisions throughout the privacy statements, one concerning  
15 potential sale. This is a concept that, beginning with the  
16 CCPA, the notion that one needed to speak about "sale". And  
17 this was largely in the context of commerce, third-party  
18 marketing, retargeting ads, sharing with social media, that  
19 sort of thing. And the policies required, the CCPA required a  
20 California state notice, as your -- as your colleague was  
21 pointing out. We also separately have a statement, and have  
22 had a statement going back to 2007, about the sale of the  
23 business.

24 Q Is that why the "sale" is in parentheses? I don't  
25 understand.

Peter Lefkowitz - Cross

1 A. In quotes?

2 Q. In quotes, yes. Sorry. Parentheses, quotes, yes.

3 A Look, as -- as I think about this, as I formulate this,  
4 there are -- there are two issues here. One is, if you look  
5 at the privacy statement at M, or at N, there's a discussion  
6 about sale for commercial purposes. There are separate  
7 statements. And we've covered -- you covered with Prof. Cate,  
8 going back through the history of the company, statements  
9 about sale of the business.

10 Q And that's why it's in quotation marks?

11 A Yes.

12 Q In paragraph 23, which is just page 9, I think --

13 A Yes.

14 Q Paragraph 23. Are you with me? Okay. 23, I'm just  
15 going to -- well, actually, can you read that sentence?

16 A "23andMe customers also may request deletion of their  
17 data at any time. And 23andMe carries out these deletion  
18 requests in conformance with its privacy statement and subject  
19 to its legal, contractual, and compliance obligations." Would  
20 you like me to continue?

21 Q No, that's fine. Thank you. Sitting here today, are you  
22 aware of any outstanding complaints from customers that their  
23 account or data has not been deleted after requesting  
24 deletion?

25 A Well, yes. And if you'd allow me to just take a moment



Peter Lefkowitz - Cross

1 to explain. We have deletion requests that come in through  
2 the service. We have had, as you know, 1.9 million of those  
3 since Attorney General Bonta's suggestion that customers  
4 delete their accounts following the bankruptcy.

5 Within that set, there is a smaller number of customers,  
6 a much smaller number of customers -- there have been 40,000  
7 since the beginning of the bankruptcy -- who needed some form  
8 of revalidation, because in order to protect people's privacy  
9 rights, we are not going to allow access to somebody's data,  
10 or deletion of somebody's data, in violation of their privacy  
11 rights, if we don't have validation of who they are.

12 The main forms -- the main areas where there may not be  
13 an appropriate understanding of who people are, is where they  
14 either have not been able to access their account, because  
15 they've lost their password, or something like that, or where  
16 they give us an incorrect date of birth. Some people have  
17 signed up as a customer over time, and they've given fake  
18 dates of birth in order to -- presumably; I'm guessing here --  
19 to protect their own privacy.

20 In either of those cases, they need to contact our  
21 customer care group. It's an escalation process. And then we  
22 go through validation of who they are. There have been  
23 approximately 40,000 of those. We have now resolved over  
24 39,000 of them.

25 Q Are you aware that certain Attorneys General, as part of

Peter Lefkowitz - Cross

1 their duties, receive consumer complaints and have received  
2 consumer complaints regarding the inability to delete their  
3 customer data?

4 A Yes. And the Attorneys General have been very good about  
5 forwarding to us -- those to us so that we could deal with  
6 them.

7 Q Okay. Can you pick up the big ones, the State of Texas  
8 exhibit book?

9 A My college roommate was from Texas. I spent four years  
10 learning about how big everything is in Texas.

11 Q If you can please turn with me to Tex-C? Texas-C?

12 A Okay.

13 Q The first two pages are an affidavit, I'll represent. So  
14 you can turn to the third page.

15 A Um-hum. Okay.

16 Q And can you tell me what you believe this represents, in  
17 your best knowledge?

18 A So before I answer, can I just ask you, are these -- are  
19 these the documents that were produced last night?

20 A Yes.

21 Q Okay.

22 MR. CLAREMAN: Excuse me, Your Honor, if I may  
23 interpose an objection.

24 THE COURT: Yes.

25 THE CLERK: We need to have you up at the mic.

Peter Lefkowitz - Cross

1 THE COURT: Up to the mic, please.

2 MR. CLAREMAN: Yes. So the document at Exhibit C is  
3 not in evidence, so I don't believe it's appropriate to read  
4 from the document. It's also a document that was provided to  
5 us last night, for the first time, in redacted form.

6 We have, I will also add, notwithstanding the late  
7 hour in which this was provided to us, particularly with  
8 respect to complaints that go back to March and April, we were  
9 able to spend some time looking into the documents that are  
10 reflected here, and in fact, have seen that many of these  
11 complaints relate to customers whose data has been deleted.

12 So I do object to the admissibility of these  
13 documents, or the use of these documents in the redacted form  
14 in which they were provided. I don't think they're  
15 appropriate to use with the witness.

16 THE COURT: Okay. Well, let's first talk about  
17 whether they're coming into evidence.

18 MR. CLAREMAN: I'm sorry. I should also add they're  
19 hearsay as well.

20 MS. MILLIGAN: We were intending to submit these  
21 documents into evidence. Regarding the redaction, one, these  
22 are complaints received, and the purpose of them is to  
23 acknowledge that there are post-petition complaints being  
24 received, by the Texas Attorney Generals, regarding the  
25 inability of customers to delete data.

Peter Lefkowitz - Cross

1           The redaction is personally identifiable information.  
2       So we, in an abundance of caution, redacted things like the  
3       email address, the address, and phone number. The consumer's  
4       first name and last name and the text of their complaint to  
5       the Texas AG are included. These have already been submitted  
6       by our office to the company, in an attempt to get them  
7       resolved, but never received a response as to whether they  
8       were resolved. So I'm glad to hear some of them have been,  
9       here today.

10           THE COURT: Are you offering C into evidence?

11           MS. MILLIGAN: Yes, sir.

12           THE COURT: Okay. We have a hearsay objection. What  
13       else do we have?

14           MR. CLAREMAN: It's a hearsay objection. That's the  
15       principle objection, that this is not a business record.  
16       There's a business record certification of someone named  
17       Michael O'Leary (ph.). These are not business records of the  
18       Texas Attorney General. They were submitted to the Texas  
19       Attorney General. So I don't believe that there's an  
20       applicable hearsay exception that applies. And I haven't  
21       heard an argument that there is.

22           THE COURT: Ms. Milligan?

23           MS. MILLIGAN: There is an affidavit of Michael  
24       O'Leary, who is available and on the line to testify if there  
25       are questions. These are records that are retained by the

Peter Lefkowitz - Cross

1 Texas attorney General related to consumer complaints  
2 specifically submitted to the Attorney General's office, and  
3 again, were only redacted for the personally identifiable  
4 information.

5 The purpose of this is not to prove the matter  
6 asserted. It's to prove that we have received complaints.  
7 We're not trying to get the specific complaint information in.  
8 It is just evidence that complaints have been submitted post-  
9 petition. So it's not for the truth of the matter.

10 THE COURT: Did the debtor stipulate that complaints  
11 have been submitted to the Texas Attorney General?

12 MR. CLAREMAN: You read my mind, Your Honor, yes.

13 THE COURT: Okay. I think that will take care of us.  
14 I don't think there's any need to use Exhibit C, Ms. Milligan.  
15 That avoids any hearsay problem.

16 MS. MILLIGAN: Okay. Thank you, Your Honor.

17 BY MS. MILLIGAN:

18 Q. In the 1.9 million requests for deletion, as the data  
19 privacy officer, were you able to confirm that those deletion  
20 requests were bona fide unique requests and not duplicate  
21 requests? Like, 1.9 million separate customers requested  
22 deletion of their data?

23 A I have not asked that question. I have not -- at the  
24 same time, as the privacy officer, I would expect to hear if  
25 there was a substantial problem with that, and I have not.

Peter Lefkowitz - Cross

1 Q Okay. Let's talk a little bit about the transactions.

2 You talked a little bit about the asset purchase agreement.

3 This transaction that's being proposed is the establishment of  
4 a NewCo, a subsidiary, correct?

5 A That is --

6 Q. And then --

7 A. That is part of the transaction.

8 Q Right. Part of the transaction. I'm not saying that's a  
9 complete transaction. Sorry for the confusing question. And  
10 then a separate transaction between NewCo and TTAM. Is that  
11 your understanding?

12 A That is my understanding.

13 Q Does NewCo have any assets, to your knowledge?

14 A Prior to all of the data going into it? You know,  
15 I'll -- I'll admit to you, I am not an expert on tax law. I'm  
16 not an expert on corporate restructuring. I think any entity  
17 that's ever set up starts out as just an entity.

18 Q And I apologize; I should back up. Has NewCo been  
19 created yet, to your knowledge.

20 A I don't know the answer to that.

21 Q Okay. You state in your paragraph -- well, I think there  
22 has been testimony that the sale, the asset purchase  
23 agreements, have terms that are consistent with the  
24 obligations in the privacy statement and would remain subject  
25 to those pre-existing privacy statements. But that is subject

Peter Lefkowitz - Cross

1 to the ability to change those privacy statements, correct?

2 A That is correct.

3 Q The day after the closing of the sale, the privacy  
4 statements can be changed. Is that your understanding?

5 A That's correct.

6 Q Okay. The day before bankruptcy is filed, the privacy  
7 policies can be changed by the company.

8 A They could have been, but they were not.

9 Q Okay. And you, I think, previously testified you had no  
10 knowledge of whether the change in 2022, to include bankruptcy  
11 in the disclosure part of the privacy policies, prompted an  
12 email to customers of the change. You don't know that?

13 A Well, two answers to that. I don't know the answer to --  
14 to that specific question.

15 Q. Okay.

16 A. But I'll just quibble a bit with the notion of including  
17 bankruptcy. It included the word "bankruptcy". I believe  
18 that bankruptcy has always been part of the notion of a  
19 business transition.

20 MS. MILLIGAN: I think, first of all, move to strike  
21 the second part of his comment, just because it's his opinion  
22 as to what the previous policies that he's testified he has no  
23 knowledge of say.

24 THE COURT: Overruled. I'll allow it.

25 MS. MILLIGAN: Okay.



Peter Lefkowitz - Cross

1 Q. There are certain data privacy enhancements that have  
2 been proposed as part of this transaction. Are you aware of  
3 those?

4 A Yes, I am.

5 Q Have you, in your knowledge, reviewed whether those data  
6 assurances are something that 23andMe already does, such as  
7 having a privacy board or --

8 A If you -- if you have the -- if you -- if you have the  
9 list, I can go through them with you.

10 Q. Okay. I --

11 MR. CLAREMAN: Your Honor, I'm actually going to  
12 object to this line of questioning on the grounds that there  
13 was a prior version of the declaration, that we filed on the  
14 docket and offered into evidence, that related to the  
15 questions that Ms. Milligan is now asking. And we struck the  
16 paragraph at their request. So I think the questioning now  
17 exceeds the scope of cross and is, in any event, improper  
18 because it was stricken from the direct at their request.

19 THE COURT: Ms. Milligan?

20 MS. MILLIGAN: Respectfully, I thought that was  
21 California's request, but I do agree it's stricken, so I'm  
22 happy to withdraw the question if it's --

23 THE COURT: It's withdrawn. Go ahead.

24 Q Are you aware of any specific state's data privacy laws  
25 related to genetic matter?



Peter Lefkowitz - Cross

1 A Of course.

2 Q Are you aware of the Texas Direct-to-Consumer Genetic  
3 Testing Act?

4 A Yes.

5 Q Are you aware that Texas customers have a perpetual right  
6 to delete their data under Texas law?

7 A I'm not sitting with the law in front of me. If you, as  
8 a member of the Attorneys General's office, represent that to  
9 me, I'll accept it.

10 Q Okay. And the transaction that is being proposed, as part  
11 of this asset purchase agreement, does not contemplate  
12 obtaining separate express consent from Texas consumers, in  
13 your understanding; is that right?

14 A That is exactly right.

15 Q Okay.

16 A Excuse me.

17 Q. Yes, sir.

18 A. It does not contemplate obtaining a new second express  
19 consent. I believe that that consent has already been  
20 obtained.

21 Q You believe that consumers who signed up with 23andMe as  
22 an entity consented ahead of time that their data can be  
23 transferred or disclosed to a third party?

24 A I believe that, when they clicked "agree" to the terms of  
25 service and privacy statement, they were agreeing that their

Peter Lefkowitz - Cross

1 data could be part of a transaction.

2 Q I think we'll respectfully disagree about that, but I  
3 appreciate your testimony.

4 A I expected you would.

5 MS. MILLIGAN: I think that's all the questions we  
6 have. That's all the questions we have. Thank you.

7 Thank you, sir.

8 THE COURT: Okay. Additional cross, Mr. Nadal?

9 MR. NADAL: Just very briefly.

10 You talked a couple moments ago about --

11 THE COURT: Oh, well, that wasn't really -- I was  
12 really asking about the other parties.

13 MR. CLAREMAN: Your Honor, I'd object. I don't think  
14 it's proper.

15 THE COURT: We'll see if we need recross, but let's  
16 hold it.

17 Any other parties wish to cross-examine the witness?

18 MS. EICHELE: Your Honor. Elizabeth Eichele. If the  
19 Court would permit me, I do have a few questions for this  
20 witness.

21 THE COURT: Briefly. Go ahead.

22 MS. EICHELE: Yes, Your Honor. Thank you.

23 CROSS-EXAMINATION

24 BY MS. EICHELE:

25 Q. Good afternoon, Mr. Lefkowitz. My name is Elizabeth

Peter Lefkowitz - Cross

1 Eichele, and I'm a 23andMe customer. I filed an objection  
2 docketed as ECF 764. Throughout the Wednesday hearing, I  
3 heard repeatedly that customers are free to delete their  
4 accounts at any time. And you stated the current situation,  
5 which saved me several questions, of some of the problems that  
6 people have been having. I will assume your numbers are  
7 correct for the purposes of how many people are left having  
8 problems. But you acknowledge -- are you acknowledging that  
9 there are still people that are having problems with deleting  
10 their account?

11 A I -- I acknowledge that there are still open customer  
12 care cases for people who need to validate their identity and  
13 close their accounts. And we're working actively to close  
14 those. We're happy to work with any consumer or, if the AGs  
15 provide us notice, with the AGs to -- to help address those.

16 Q Okay. Do you know when the birth date screen requirement  
17 was added?

18 A It was added in early -- I believe, early 2024, in order  
19 to better protect customers against the possibility that  
20 somebody else doing a credential stuffing, or other attack,  
21 could access or delete somebody's data.

22 Q Do you know if it was added before or after 23andMe knew  
23 they were going to file for bankruptcy?

24 A. Before.

25 Q. Okay. The birth date screen has also been added in order

Peter Lefkowitz - Cross

1 for a customer to change even their email address; is that  
2 correct?

3 A I don't know the answer to that.

4 Q Okay. And are you aware that, after a certain number of  
5 tries of inputs of a birth date, that the customer sees a  
6 screen that says they've exceeded their number of attempts and  
7 must call customer service or contact customer service?

8 A Yes. And we do that, and technology companies generally  
9 do that, in order to avoid credential stuffing attempts  
10 that -- that generally involve multiple efforts with multiple  
11 sets of data to try to access an account.

12 Q And you have previously stated that customer service  
13 requires additional identifying information from a customer in  
14 order to effectuate the deletion of their account; is that  
15 correct?

16 A Correct.

17 Q Okay. And that would be a government issued ID; is that  
18 correct?

19 A Yes, we work with a service called Vouched.

20 Q Would you agree that one's driver's license number  
21 information, et cetera, passport information, or other  
22 government ID information is additional personal identifying  
23 information that 23andMe is collecting?

24 A Vouched is collecting.

25 Q So this is an outside entity other than 23andMe; is that

Peter Lefkowitz - Cross

1 correct?

2 A Correct.

3 Q Okay. Would you agree that, if there's an issue with the  
4 birth date screen, in other words, if the customer is  
5 inputting the correct birth date, and they get denied however  
6 many times before they get told to contact customer service,  
7 that they're basically being asked by 23andMe to initiate --  
8 well, they're being asked -- 23andMe is initiating the account  
9 deletion rather than permitting the customer to do so; is that  
10 correct?

11 A I'm sorry; I don't understand the question.

12 Q Well, a customer normally can go into 23andMe and click  
13 on delete their account. And now, with the relatively new  
14 screen of the birth date requirement, if they put in a birth  
15 date, and 23andMe system acknowledges that birth date, then  
16 the customer can delete the account right there without having  
17 to contact customer service, correct?

18 A That is the way the service works, yes.

19 Q All right. My personal experience was I was entrusted  
20 with a couple of family members' accounts who asked to delete  
21 them, and my own. And having gone through all of them with  
22 correct birth dates, it still told me I had to contact  
23 customer service. And at that point, I was asked to produce  
24 government IDs and to email them in those emails, to 23andMe  
25 directly, or that was what customer service was showing, I

Peter Lefkowitz - Cross

1 would be sending it directly to them. And being that I'm  
2 trying to delete information so it isn't part of the sale,  
3 adding additional identifying information, particularly  
4 government IDs, when the information was input correctly, was  
5 a little bit disturbing to me. Can you understand that?

6 A I appreciate your concern. Our customer care team is  
7 happy to work with you. I don't know the specifics of your  
8 circumstance.

9 Q Well, I said the specifics of the particular situation  
10 was that correct birth dates -- the relatively new birth date  
11 screen, which I hadn't seen for most of the time I've been a  
12 23andMe customer; it's relatively late in the game, is the  
13 correct birth dates were put in, and it was still denied and  
14 sent to customer service.

15 A. You --

16 Q. So now --

17 MR. HOPKINS: Your Honor, if I may?

18 MS. EICHELE: I'm sorry?

19 MR. HOPKINS: This is Chris Hopkins from Paul, Weiss,  
20 counsel to the debtors. I apologize for interrupting your  
21 cross. I just wanted to offer --

22 MS. EICHELE: That's okay.

23 MR. HOPKINS: I believe you sent me an email today.  
24 I believe I responded to that email. And we are happy to work  
25 directly with you, and the folks at the company, to resolve

1 the deletion issues you're having with respect to yourself and  
2 your family members, if that would resolve the cross. And we  
3 will do that as quickly as possible.

4 MS. EICHELE: Would that be without forcing me to  
5 provide additional identifying information such as driver's  
6 license, passport, et cetera?

7 MR. HOPKINS: We will do our best. But as Mr.  
8 Lefkowitz said, there are certain privacy procedures that the  
9 company has to follow, but we will find any conceivable  
10 solution to address your issues as quickly as we can.

11 MS. EICHELE: Well, I would appreciate that. The  
12 problem is that that's never been a requirement to delete the  
13 accounts prior to this situation. And now all of a sudden it  
14 is.

15 THE COURT: Okay. All right. Hold on. All right.  
16 Thank you, Mr. Hopkins, for that creative solution.

17 Ms. Eichele, I understand your concern. I understand  
18 the company's position that there are issues with privacy --  
19 let me put it this way. There are issues with identity  
20 verification in both creating and deleting accounts. And the  
21 company seems to be trying to work through that as best they  
22 can.

23 So I'm going to conclude this cross-examination.  
24 Respectfully, your personal situation is something that ought  
25 to get resolved, but it is not something that ought to hold up

1 this sale. And so thank you for appearing, Ms. Eichele. And  
2 please work with Mr. Hopkins, or somebody from his team, that  
3 he will get in touch with you. And I think, if there's a  
4 solution to be found, the parties will find it.

5 MS. EICHELE: Thank you, Your Honor. I appreciate  
6 it. And I will be in contact with him. And I appreciate his  
7 jumping in.

8 THE COURT: Very good.

9 MS. EICHELE: Thank you, Judge.

10 THE COURT: All right. Additional cross-examination?  
11 Okay. Redirect?

12 MR. CLAREMAN: No redirect, Your Honor.

13 THE COURT: No redirect.

14 Recross? Do I want to ask about recross?

15 MR. NADAL: Your Honor, I don't have any recross. I  
16 just wanted to thank the witness for the work that he's done  
17 in working with the Attorney General's office.

18 THE COURT: Oh, well, there we go.

19 All right. Thank you. You may step down, Mr.  
20 Lefkowitz.

21 We should probably be thinking about taking a lunch  
22 break, but tell me what's up next.

23 MR. HOPKINS: Your Honor, I think that concludes the  
24 debtors' evidence. I believe we have some evidentiary issues  
25 with certain of what we understand the states will be putting



1 forward as their evidence. I think, if it's all right with  
2 Your Honor, and not to impose on the Court or anyone that's  
3 here today, I think, in the interest of advancing this  
4 hearing, we would ask for a short lunch break and then to come  
5 back and quickly work through the states' evidence.

6 THE COURT: Sure. But before, are all of your  
7 exhibits in, or are you holding that till the end?

8 Go ahead. Go ahead and -- yeah, take your time.

9 MR. HOPKINS: Yes, Your Honor, I confirm all of the  
10 debtors' exhibits are in.

11 THE COURT: Okay. All right. So timing for lunch.  
12 We can't go too short because folks have been sitting here and  
13 have got to get up and eat.

14 MR. HOPKINS: Understood, Your Honor.

15 THE COURT: What do you suggest?

16 MR. HOPKINS: And the cafeteria is --

17 THE COURT: The cafeteria is closed.

18 MR. HOPKINS: -- unfortunately closed.

19 THE COURT: The cafeteria is closed, yes. I brought  
20 a brown bag, but I live here, so it's a little easier for me  
21 to do that. So --

22 MR. KIRPALANI: What did you bring, Your Honor?

23 THE COURT: I don't remember. I'm laser focused on  
24 the testimony, Mr. Kirpalani. I've totally forgotten about  
25 what I brought for lunch. All right.

1 So how long do you suggest, Mr. Hopkins?

2 MR. HOPKINS: If it would be all right with the  
3 Court, could we resume at 1:30?

4 THE COURT: Any objection to 1:30? Do folks have a  
5 lunch option that's going to work?

6 Ms. Milligan?

7 MS. MILLIGAN: I think 1:30 is fine. And I'm also  
8 happy to discuss with counsel, during that break, the  
9 remaining exhibit issues --

10 THE COURT: Okay.

11 MS. MILLIGAN: -- and see if we can get those  
12 resolved.

13 THE COURT: Perfect. Okay. So --

14 MR. HOPKINS: Yeah, we'll make as much progress as we  
15 can.

16 THE COURT: Let's do 1:30. If you need more time to  
17 talk, as always, talk to Mr. Spidle, and we'll get that for  
18 you. But otherwise, we'll be in recess till 1:30.

19 MR. HOPKINS: Thank you, Your Honor.

20 (Recess from 12:54 p.m. until 1:32 p.m.)

21 THE CLERK: We're on the record.

22 THE COURT: Thank you. Please be seated. Okay.  
23 Where are we?

24 MS. MILLIGAN: Layla Milligan for the State of Texas.  
25 I understand that debtors are -- I'm not sure if debtor has

1 additional documents to submit into evidence or --

2 MR. RECHER: No --

3 MS. MILLIGAN: Okay.

4 MR. RECHER: -- we do not. So I think -- and we can  
5 do this on a consensual basis. I understand there are a  
6 couple documents the State of Texas would like to seek  
7 admission.

8 MS. MILLIGAN: Yes. Thank you. In the Texas, State  
9 of Texas exhibit list and booklet, there is Texas D, which is  
10 a written statement. It goes to Selsavage --

11 THE COURT: It's a B, bravo?

12 MS. MILLIGAN: D as in --

13 THE COURT: D, Delta.

14 MS. MILLIGAN: -- in dog.

15 THE COURT: Okay.

16 MS. MILLIGAN: Delta, yeah.

17 THE COURT: Yeah.

18 MS. MILLIGAN: A written statement of Joseph  
19 Selsavage to the House Committee on June 10th, 2025, and I  
20 would ask the Court to submit that into evidence?  
21 (J. Selsavage statement was hereby marked for identification  
22 as State of Texas' Exhibit D, as of this date.)

23 THE COURT: Any objection?

24 MR. RECHER: No objection.

25 THE COURT: All right.



1 MS. MILLIGAN: Texas --

2 THE COURT: Texas, D, Delta is admitted.

3 (J. Selsavage statement was hereby received into evidence as  
4 State of Texas' Exhibit D, as of this date.)

5 MS. MILLIGAN: Thank you.

6 And Texas E is another written statement of Joseph  
7 Selsavage to the Senate Committee, dated June 11th, 2025.

8 (Statement of Selsavage was hereby marked for identification  
9 as State of Texas' Exhibit E, as of this date.)

10 THE COURT: Any objection?

11 MR. RECHER: No objection.

12 THE COURT: Texas, echo is admitted.

13 (Statement of Selsavage was hereby received into evidence as  
14 State of Texas' Exhibit E, as of this date.)

15 MS. MILLIGAN: I believe Texas F was admitted  
16 Wednesday so --

17 THE COURT: Yes. That's consistent with our records.  
18 Okay.

19 MS. MILLIGAN: I will say there are two other  
20 documents that I think the Court can take notice of, but out  
21 of an abundance of caution, I'm asking for submission into  
22 evidence, one is the joint stipulation and agreed order  
23 directing U.S. Trustee to appoint a CPO, which is at docket  
24 number 346.

25 (Joint stipulation was hereby marked for identification as

1 State of Texas' Exhibit 346, as of this date.)

2 THE COURT: 346?

3 MR. RECHER: No objection.

4 THE COURT: No objection. 346 is admitted.

5 (Joint stipulation was hereby received into evidence as State  
6 of Texas' Exhibit 346, as of this date.)

7 MS. MILLIGAN: Thank you, Your Honor. And then  
8 finally is the actual consumer privacy ombudsman report, and  
9 that is at docket 718.

10 THE COURT: 718.

11 MS. MILLIGAN: And all of the attached documents that  
12 are associated with that report.

13 (Consumer privacy ombudsman report was hereby marked for  
14 identification as State of Texas' Exhibit 718, as of this  
15 date.)

16 THE COURT: Any objection to the admission of the CPO  
17 report 718?

18 MR. RECHER: No objection on the understanding that  
19 we have that the State of Texas -- the document is not being  
20 offered for any evidentiary value with respect to the meaning  
21 instruction of the law, which I think is the same basis on  
22 which we offer Professor Cate's declaration.

23 THE COURT: Is that agreeable?

24 MS. MILLIGAN: I believe that Professor -- I'm not  
25 going to try characterize his testimony. I think he prepared

1 this report pursuant to the joint stipulation for the  
2 assistance of the Court to review, and of course, it's not  
3 binding on the Court. So the Court would not have -- it's not  
4 evidence of what the Court should do. That's correct. I  
5 think that's the same agreement.

6 THE COURT: It stans on the same plane as Professor  
7 Cate?

8 MS. MILLIGAN: Yeah.

9 MR. RECHER: I'm fine with that --

10 THE COURT: Okay.

11 MR. RECHER: -- that understanding that it's on the  
12 same plane as Professor Cate.

13 THE COURT: Okay. With that understanding, I'll  
14 admit the CPO report 718.

15 (Consumer privacy ombudsman report was hereby received into  
16 evidence as State of Texas' Exhibit 718, as of this date.)

17 MR. RECHER: Thank you, Your Honor.

18 MS. MILLIGAN: And that's all the exhibits that Texas  
19 at this time for submission. So I think that's all.

20 THE COURT: Any witnesses? Witnesses from Texas?

21 MS. MILLIGAN: Yes, Your Honor. Texas calls -- and  
22 I'm sorry. One housekeeping matter --

23 THE COURT: Sure.

24 MS. MILLIGAN: Because Texas and California and  
25 Tennessee and Kentucky, I think have pending objections, it

1 may make sense to sort of consider them concurrently so we  
2 only have to call witnesses once and not, like, have the  
3 witness come in and answer my questions and then answer them  
4 again and answer --

5 THE COURT: That sounds fine.

6 MS. MILLIGAN: -- someone else's question.

7 THE COURT: That sounds fine.

8 MS. MILLIGAN: Very good.

9 And the State of Texas calls Professor Neil Richards  
10 to the stand.

11 THE CLERK: Please raise your right hand, and state  
12 your name for the record.

13 MR. RICHARDS: Neil Richards.

14 (Witness sworn)

15 THE CLERK: Please take a seat. Speak directly into  
16 the microphone.

17 DIRECT EXAMINATION

18 BY MS. MILLIGAN:

19 Q. Good afternoon, Professor Richards.

20 A. Good morning, Ms. Milligan.

21 Q. Laylan Milligan again appearing on behalf of the State of  
22 Texas, but we know that. So can you please just state your  
23 name and your current position?

24 A. My name is Neil Michael Richards. I am a Koch  
25 distinguished professor in law and the codirector of the

Neil Richards - Direct

1 Cordell Institute for Policy in Medicine and Law at Washington  
2 University here in St. Louis.

3 Q. Fantastic. And also --

4 A. And I'm also the CPO.

5 Q. Okay. My next question was you were appointed in this  
6 case to serve as the consumer privacy ombudsman, correct?

7 A. That's correct.

8 Q. All right.

9 A. It's been more of a life than being a professor for the  
10 past five weeks.

11 Q. You filed a report with the Court on June 11th, 2025; is  
12 that correct?

13 A. I believe that's true. It was last Wednesday.

14 Q. Okay. Time has flown. So did you prepare this report?

15 A. Yes.

16 Q. Were the documents attached to the report used by you in  
17 the preparation of the report?

18 A. Yes.

19 Q. Can you describe who you interviewed or sought  
20 documentation from to prepare the report?

21 A. Sure. So I understood my charge to conduct an  
22 examination pursuant to paragraph 3 of the joint order of the  
23 stipulation entered by this Court to assist the Court in its  
24 determination of certain issues relevant to the bankruptcy  
25 proceeding before us. I, initially, upon being appointed, I



Neil Richards - Direct

1 talked to the U.S. Trustee's Office to get my charge. They  
2 encouraged me to retain counsel as rapidly as possible. I  
3 endeavored to do that. I reached out to counsel for the  
4 debtor, Mr. Hopkins. We spoke I think the day that I was  
5 appointed. I conducted my examination by seeking interviews  
6 where possible through counsel for the debtor with the various  
7 stakeholders, this included, in addition to privacy and  
8 security presentations by counsel for the debtor relating to  
9 the debtor's privacy and security practices.

10 Separate interviews with in sort of rough order of  
11 chronology: the committee with subsets of the committee  
12 related to the data breach, plaintiffs, and the data breach --  
13 so the data breach cause action plaintiffs and the data breach  
14 arbitration claimants. I also met with counsel and leadership  
15 of both of the two bidders at that time, Regeneron and then  
16 TTAM. I also met with, upon their request, counsel for the  
17 State of California, and then I think my final formal  
18 interview right before attending the hearing two weeks ago on  
19 Wednesday was with the State AG's multistate and NAAG. I may  
20 have missed someone, but as I sit here today, that list is are  
21 the ones that are salient to me.

22 Q. Very good. Did you meet with -- you said you met with  
23 the leadership of TTAM. Who did you meet specifically with?

24 A. It was -- it was -- all of these meetings that I've  
25 described were Zoom or Teams calls. Ms. Wojcicki was on the

Neil Richards - Direct

1 TTAM call. There were others, but that interview was largely  
2 a conversation between myself and her as I recall it. There  
3 were lawyers on the call, both I think counsel for the debtor,  
4 privacy counsel was there. There were lawyers for TTAM, who  
5 were also there, but the majority of the conversation was the  
6 two of us.

7 Q. To your knowledge, did the debtors and the parties  
8 provide you with all of the information you requested to  
9 prepare your report?

10 A. So I think I say in my report, on the whole, all  
11 stakeholders were cooperative, and I stand by that statement.  
12 I think, you know, in any examination you're going to have  
13 questions that maybe cannot be answered or questions that  
14 people don't want you to answer, but on the whole, I was  
15 satisfied with the volume of factual and other material that  
16 was made available to me. As I also note in my report, some  
17 of the materials were coming in within a week of even the  
18 revised CPO deadline of last Wednesday.

19 Q. Were you able to reach a conclusion that the proposed  
20 sale -- TTAM, I guess now, would comply with nonbankruptcy  
21 law?

22 A. So that's a really important question. This is, as we're  
23 all aware, and I think as we've all heard a lot over the past  
24 two days in court has been very fast moving -- at least by my  
25 understanding, it's a fast-moving bankruptcy proceeding, and

Neil Richards - Direct

1 of course, my report was filed before I knew that TTAM was  
2 going to be the successful bidder.

3 Q. Okay. So in your review were you able to -- you were  
4 looking at the original purchase agreement with TTAM; is that  
5 correct?

6 A. That's correct.

7 Q. Okay. Did you review the amended or the revised asset  
8 purchase agreement when that was changed?

9 A. Which one are you referring to? I want to be sure  
10 that -- I've been through a lot of tabbing already today, and  
11 I want to be sure that I'm answering the -- that we have a  
12 meeting of minds on which document we're talking about.

13 Q. I would say the latest amended asset purchase agreement  
14 submitted by the debtor between debtors and --

15 A. So I have not read the entire thing. It was not made  
16 available to me by counsel for the debtors, but I have some  
17 familiarity with the privacy, the purported voluntary privacy  
18 safeguards.

19 Q. In your opinion, since I know you've only reviewed part  
20 of the amended asset purchase agreement, would the changes to  
21 your knowledge change the opinion that you have expressed in  
22 this report as to any of your findings?

23 A. No.

24 Q. Okay. Is it your opinion that the transaction as  
25 proposed complies with applicable nonbankruptcy law?

Neil Richards - Direct

1 A. So I think, Counsel, it's important at this point to look  
2 at my report and the method that I applied in my report. I  
3 tried as best I could to answer the questions that were  
4 framed -- that were posed to me by the Court in paragraph 3 of  
5 that report. I believe paragraph -- there were eight of them,  
6 but they were labeled A through F, and there were two sort of  
7 unlabeled additional questions that were in there, but I  
8 believe that paragraph 3-B of the joint order and stipulation  
9 addressed that. And my conclusion was that -- and again, I'm  
10 giving you an oral summary of my report. My report is  
11 controlling here. My opinion has not changed, but I could not  
12 conclude that there was not a violation --

13 Q. And --

14 A. -- of applicable nonbankruptcy law.

15 Q. Thank you. I didn't mean to interrupt you. Thank you.  
16 Were you present in the courtroom for the testimony of  
17 Professor Cate?

18 A. Yes, I was.

19 Q. Do you agree with his assessment?

20 A. No. Some of it, I might agree with it, but on the whole,  
21 no. I do not agree with the general thrust of his opinions.

22 Q. What specifically do you disagree with, if it can be  
23 reducible to an easy answer?

24 A. Right. So let me say, I think there are perhaps --  
25 without prejudice to other -- we're law professors, right? We

Neil Richards - Direct

1 like to disagree. Without prejudice to other areas of  
2 potential disagreement, I think with respect there may be two  
3 or three of them that I want to highlight in response to your  
4 question. The first is I think the -- my view and my report  
5 answered the question addressed to me in paragraph 3 and not  
6 to opine about the construction of 363. I can't speak to  
7 Professor Cate's expertise, but I am not a bankruptcy expert.  
8 I am a privacy expert, and I understood that my testimony  
9 today and my written report to be offered in that vein of  
10 expertise.

11 Second, with respect to the discussion of notice and opt  
12 in, opt out. I was very surprised by Professor Cate's  
13 statements that the consumers had made a choice when both on  
14 the stand today and in his own scholarship, he's been very  
15 critical of notice and choice, agreements of the sort that  
16 were put forth by the '22 version of the 23 new privacy policy  
17 between 2007 and the present. In particular, I recall -- I  
18 looked up a 2011 article in the California Law Review in which  
19 he said that consumers don't read privacy policies and often  
20 misinformed and poor choices on the basis of policies they  
21 haven't really particularly the fine print.

22 And then the third point -- sorry. I think I said there  
23 were three. The third point is the discussion of the scope of  
24 what constitutes the relevant privacy policies of the debtor  
25 in this case, and I was puzzled by Professor Cate's suggestion

Neil Richards - Direct

1 that regulators and privacy lawyers and scholars don't look at  
2 the totality of representations made by a company towards  
3 consumers, and this sort of fixation on one word in the fine  
4 print out of 10,000 -- close to 10,000 words that consumers  
5 are -- or suggested to read, the word, bankruptcy. Was it all  
6 with the way -- for example, the FTC addresses it. I notice  
7 that Professor Cate cited the FTC letter from Chair Ferguson  
8 to the debtor in March of this year. If you look at that  
9 letter, which is reproduced in the appendix to my report and  
10 which is cited by Professor Cate and his report, you'll see  
11 that the FTC talks about representations broadly as made to  
12 consumers of the first step in analysis of whether the  
13 policies regarding privacy are misrepresentations or  
14 inconsistent with actual practice or not.

15 Q. So in your opinion, if a privacy statement in the first  
16 page, first line says, we will not sell your data, or we will  
17 not sell your data without your expressed consent, and then  
18 later, in the body or at the end of privacy statement says, we  
19 may transfer or sell the company, do those two comments -- are  
20 they inconsistent?

21 A. So as I said -- I think before we get into that, Counsel,  
22 I think it's important to talk about method.

23 Q. Okay.

24 A. Because I think method -- particularly for academic work  
25 and expert reports, method is very, very important. And as I

Neil Richards - Direct

1 talk about in my report, the method that I followed was the  
2 ways in which actual consumers would encounter and would  
3 understand representations about the privacy policies of a  
4 company, and those begin at the general level. For example, I  
5 recall this morning, there was a discussion of the  
6 23andMe.com/privacy page where we put privacy first. I detail  
7 a lot -- I don't mean to cover ground that is laid out with  
8 greater precision in the words of my expert report. I would  
9 refer you to that. But I do think that you when you look at  
10 the total -- as I say in my report, when you look at the  
11 totality of the representations made by the debtor in this  
12 case and you look at it the way that consumers -- and not, as  
13 I say in my report, lawyers at large law firms, or for that  
14 matter, law professors with privacy training would zero in on  
15 the one word bankruptcy or the other word -- you know, the  
16 fine print in the 10,000 words of -- 9,306 words, I think it  
17 is actually in the consumer facing representation. So that  
18 doesn't count the slash privacy page which has even more words  
19 that consumers have to wade through, a daunting task, as I  
20 say. When you do that, I could not say that it was  
21 consistent, and that's I believe the way it's phrased in my  
22 report. And again, I would stand by the precise words in my  
23 report because it was a very meticulous and careful and  
24 methodologically-focused task that I engaged in in my report,  
25 but I was surprised that Professor Cate did not engage with

Neil Richards - Direct

1 that in his shorter report.

2 Q. Are you familiar with the Texas Direct to Consumer  
3 Genetic Testing Privacy Law?

4 A. I am.

5 Q. And is it your understanding that that law actually  
6 grants Texas citizens a property interest in their genetic  
7 data?

8 MR. CLAREMAN: Objection, Your Honor. The nature of  
9 the objection is I don't believe that the questions that are  
10 being asked now are covered in the text of the report. So I  
11 do think it's an undisclosed opinion. We had reached out to  
12 counsel for the CPO prior to the hearing to inquire whether or  
13 not Professor Richards intended to offer any opinions that  
14 were not encompassed within his report or had any opinions  
15 that were encompassed within his report, and if we did, we  
16 would have pressed a deposition, and we agreed to forego a  
17 deposition on the basis that no undisclosed opinions would be  
18 offered. So I believe that we are now probing an area that's  
19 not discussed in the text of the report, in which event, I  
20 would object to the question.

21 THE COURT: Ms. Milligan?

22 MS. MILLIGAN: I was not aware of that agreement, and  
23 so I ask -- and I understood that that law was one of the  
24 issues that he may have referenced in his report, and so I  
25 thought it was ripe for asking. If it's not, I will have to



Neil Richards - Direct

1 defer to the report, but I don't know really how to respond.  
2 I'm not aware of the agreement. I wasn't aware that they  
3 sought a deposition. I'm not trying to exceed the terms of  
4 his report. I literally thought that that was referenced in  
5 his report.

6 THE COURT: Yes, sir?

7 MR. FIRSENBAUM: Good afternoon, Your Honor. Ross  
8 Firsenbaum from Wilmer, Hale, counsel for the CPO. I think  
9 Mr. Clareman's description of the agreement is accurate.  
10 Obviously, at the time that we were discussing whether the  
11 debtors were going to take a deposition, CPO had no intention  
12 of offering any opinions beyond the scope of his report. I'm  
13 not here asking him questions. I have no idea what questions  
14 anybody is asking, and the CPO is on the stand under oath, and  
15 people are asking him questions that are within the scope of  
16 his expertise. So if Your Honor doesn't think questions are  
17 appropriate, we defer to Your Honor on that, but there's  
18 certainly no intention to go beyond the scope of any agreement  
19 that we've made or what the Court would like to do in this  
20 proceeding, and we defer to Your Honor.

21 THE COURT: Okay. Well, I'm not sure exactly sure  
22 where this is going to go.

23 But this particular question, Ms. Milligan, I don't  
24 think the CPO's understanding of that particular Texas law is  
25 especially relevant to his conclusion, and it says what it



Neil Richards - Direct

1 says, of course. So why don't we move on and see where else  
2 we go with this.

3 BY MS. MILLIGAN:

4 Q. I think I have one final question for you, can you  
5 describe how much time that you spent on the report drafting,  
6 reviewing documents, and interviews?

7 A. Many, many, many hours over about four or five weeks. I  
8 don't have my time sheet in front of me, and I know that I  
9 have devoted -- I think counsel for the debtor mentioned there  
10 was the promise, let's say, of a deposition that was  
11 enticingly teased earlier in the week, and I certainly spent  
12 time preparing for that eventuality, and of course, my  
13 testimony today. I would say, again off the top of my head,  
14 I'll be submitting a time sheet hopefully to someone for  
15 compensation of my time at some point -- well over a hundred  
16 hours. Probably for preparation of the report about 150, and  
17 of course, I -- in order to meet the exigencies of the  
18 accelerated deadline insisted by counsel for the debtor in  
19 this case for the submission of the CPO report, there was  
20 additional considerable time that members of my team that I  
21 was supervising and overseeing their work also engaged in, but  
22 certainly, in excess of 150 hours.

23 Q. Thank you. That's all the questions I have. Thank you.

24 THE COURT: Mr. Nadal?

25 CROSS-EXAMINATION

Neil Richards - Cross

1 BY MR. NADAL:

2 Q. Good afternoon, Professor Richards.

3 A. Good afternoon.

4 Q. My name is Daniel Nadal. I'm with the California Office  
5 of the Attorney General here for the People of the State.

6 Thank you for your -- you submitted a report, correct?

7 A. I did.

8 Q. Can you turned to page 39 to 40?

9 A. I'm not sure I've been given a copy of my report. There  
10 may well be one up here, but --

11 MR. NADAL: May I approach, Your Honor?

12 THE COURT: Yes.

13 THE WITNESS: I think my counsel has a copy, if  
14 that's helpful.

15 THE COURT: If you need to move any of those other  
16 binders, any of these various rails around you, we'll do it  
17 for now, I think.

18 THE WITNESS: Thank you, Judge. As they say in the  
19 Navy, in the age of sail, I've cleared the decks for battle.

20 MR. NADAL: I hope you don't think about that  
21 engagement.

22 THE WITNESS: It was a metaphor, Counsel.

23 BY MR. NADAL:

24 Q. It's page 39 to 40.

25 A. Sorry. I didn't need to use reading glasses, and I've

Neil Richards - Cross

1 needed them more in the last two months. Okay. 39 to 40.

2 Q. All right. Do you see where it says in their response,  
3 dated June 9th, 2025, two questions posed by the CPO, counsel  
4 for the company explain that while there are eighteen million  
5 customers currently registered with the company, nearly one-  
6 third of those customers have not logged in during the last  
7 three years?

8 A. Yes. I do see that.

9 Q. Yes. And then you go on to say, "Indeed, more than half  
10 of 23andMe's customers have averaged one or fewer logins for  
11 the past three years since the addition of the word  
12 "bankruptcy" to the relevant provision of the privacy  
13 statement."

14 A. Yes. That's correct. It does -- I don't know whether  
15 you're asking whether I saw it or whether it says it, but both  
16 of those are true.

17 Q. Yes. You inquired of debtor about this information?

18 A. Counsel for debtor.

19 Q. Yes. And counsel for debtor provided you with that  
20 information?

21 A. Yes. On June the 9th.

22 Q. Thank you. No further questions.

23 THE COURT: Redirect examination? Cross?

24 MR. CLAREMAN: Yes, Your Honor. Very briefly. If I  
25 (indiscernible), I promise not to use (indiscernible), but if

Neil Richards - Cross

1 I may approach again?

2 THE COURT: Yes. Professor Richards has made room  
3 for it so we're in good shape.

4 CROSS-EXAMINATION

5 BY MR. CLAREMAN:

6 Q. Good afternoon, Professor Richards. My name is Billy  
7 Clareman. I'm from the law firm of Paul, Weiss, one of the  
8 law firms that is here on behalf of the debtors. We met very  
9 briefly a couple of days ago, but other than that, we haven't  
10 spoken; is that right?

11 A. That's correct.

12 Q. Okay. This is the first case in which you've served as a  
13 CPO, correct?

14 A. Yes.

15 Q. And all of the conclusions that you've reached in  
16 connection with your assignment are set forth in your report,  
17 correct?

18 A. Yes.

19 Q. All right. You have your report in front of you?

20 A. Yes.

21 Q. If I could ask you to turn to page 7, please?

22 A. Sorry. 7 or 70?

23 Q. Page 7.

24 A. It's a good thing there's no 700.

25 Q. Okay. Are you there?

Neil Richards - Cross

1 A. Yes.

2 Q. And page 7 has a header at the top, summary of legal  
3 conclusion. Do you see that?

4 A. Yes.

5 Q. And there are two paragraphs with bolded headers that set  
6 forth a summary of your legal conclusions, correct?

7 A. That's correct. To clarify, a summary of the conclusions  
8 that -- yes. Let me just stop there.

9 Q. Okay. And --

10 A. Yes. That's correct.

11 Q. So I'd like to ask you about the first paragraph  
12 following the bold header, compliance with the debtor's  
13 privacy policies. Do you see where I am?

14 A. I do.

15 Q. Okay. In that paragraph, you write, "The CPO interprets  
16 the interprets the debtor's privacy policies broadly to  
17 include not just the many versions and revisions of the  
18 23andMe privacy statement and 23andMe's terms of service, but  
19 also the frequent representations and promises 23andMe about  
20 privacy, most of which were far more visible and less likely  
21 to be understood by consumers in technical language about  
22 change and control in the privacy statement." Did I read that  
23 correctly?

24 A. That's correct.

25 Q. I'd like to ask you about the technical language that

Neil Richards - Cross

1 you're referring to in that paragraph. Now, you're familiar  
2 with the debtor's privacy statement, the current version and  
3 past versions, correct?

4 A. Yes.

5 Q. You analyzed those in connection with your report?

6 A. Yes. All twenty-two of them.

7 Q. Okay. And if you go to Appendix B of your report, which  
8 is ECF docket 718, page 131 -- I'm sorry. It starts at page  
9 129. Are you there?

10 A. Yes.

11 Q. And this is the policy that was the most recent policy as  
12 of the petition date, correct?

13 A. Off the top of my head, I don't know when the petition  
14 date was because that was not part of my analysis, but I  
15 believe this is the most recent. As it says on page 128, this  
16 is the current privacy statement.

17 Q. Okay. Current privacy statement, last updated, March 14,  
18 2025. Do you see that?

19 A. That's correct.

20 Q. All right. And if you go to page 131 of 211, there's a  
21 paragraph, commonly owned entities, affiliates, and change of  
22 ownership. It's about halfway down the page. Do you see  
23 where I am?

24 A. I see it.

25 Q. And you're familiar with this language, correct?

Neil Richards - Cross

1 A. I am.

2 Q. And that says, "If we are involved in a bankruptcy,  
3 merger, acquisition, reorganization, or sale of assets, your  
4 personal information may be accessed, sold, or transferred as  
5 part of that transaction, and this privacy statement will  
6 apply to your personal information is transferred to a new  
7 entity." Do you see that?

8 A. Yes.

9 Q. Okay. And that language that I just read, you refer to  
10 that as change in control language in your report; is that  
11 right?

12 A. I believe that was -- when you asked me about my  
13 summary -- and of course, there was a much more fulsome  
14 description of this analysis later on in the report. But when  
15 you asked me about the technical language about change in  
16 control on page 7, those refer to -- actually to the entirety  
17 of the paragraph, including the following sentence: "We may  
18 also disclose personal information about you to our corporate  
19 affiliates to help offer services in our affiliate service."  
20 So it refers to that paragraph. That -- I don't know what you  
21 would call it, but that sort of subparagraph on the third page  
22 of the privacy policy under the one, two, three, four, fifth  
23 main heading, and then the one, two, the third subpoint under  
24 the fifth main heading, yes.

25 Q. Can we shorthand that provision to change in control



Neil Richards - Cross

1 provision?

2 A. I am delighted to call it that, Counsel, instead of what  
3 I just said.

4 Q. And in fact, if you go to page 134 of your report,  
5 Appendix C, there's a chart of the change in control language  
6 over time that actually walks through all of the twenty-two  
7 versions of the report of the privacy statements you referred  
8 to. Is that what's happening in Appendix C?

9 A. Yes.

10 Q. And if we look on page 135 of 211, we see that the  
11 language in the change in control provision has been the same  
12 since June 8th of 2022, correct?

13 A. That is correct.

14 Q. And prior to that change on June 8th, 2022, and we see  
15 this in the last update, February 3rd, 2022, "In the event  
16 that 23andMe goes through a business transition such as a  
17 merger, acquisition by another company, or sale of all or a  
18 portion of its assets, your personal information will likely  
19 be among the assets transferred. In such a case your  
20 information would remain subject to the promises made in any  
21 pre-existing privacy statement," and that's from a section on  
22 business transaction. Did I read that correctly?

23 A. You did.

24 Q. And if you turn the page, that same language existed in  
25 the privacy statement in the change in control provision going

Neil Richards - Cross

1 back to June 24 of 2010. That's the second to last row in  
2 this table; is that right?

3 A. Actually, I think it goes back to December the 1st, 2011,  
4 when the language -- no. No. I'm sorry. That's correct,  
5 yes.

6 Q. And prior to that, the language said, "In the event that  
7 23andMe goes through a business transition such as a merger,  
8 acquisition by another company, or sale of all or a portion of  
9 its assets, your personal information and nonpersonal  
10 information will likely be among the assets transferred,  
11 you'll be notified in advance by email and prominent notice on  
12 our website of any change in ownership or control of your  
13 personal information. We will require an acquiring company or  
14 merger agreement to uphold the material terms of its privacy  
15 statement, including honoring requests for account deletion."  
16 Did I read that correctly?

17 A. Yes.

18 Q. Okay. Now, if I can direct you -- well, you agree that  
19 the language we just read, this is the change in control  
20 language that you were making reference to in the paragraph we  
21 read on page 7 of your report; is that correct?

22 A. Yes.

23 Q. And you agree that it is true that there's always been  
24 language in the actual privacy statement that personal data  
25 could be transferred under a change of ownership?

Neil Richards - Cross

1 A. Not in those exact words.

2 Q. Okay. Well, she would look at your exact words? If I  
3 can direct you to page 38. I don't want to put words in your  
4 mouth. Go to page 38, please. And that's page 41 of 211 in  
5 the ECF number. You're in the middle page, you write, "While  
6 it is true that there has always been technical legal language  
7 in the fine print of the actual privacy statement, the data  
8 could be transferred under a change of control. This document  
9 has been changed twenty-two times since 2007, and it was only  
10 after June 8, 2022, that the word bankruptcy was added." Did  
11 I read that correctly?

12 A. Yes, you did.

13 Q. And you'd agree with the statement as you wrote it in the  
14 first part of that sentence, while it is true that there's  
15 always been what you called technical legal language in the  
16 fine print of the actual privacy statement, the data could be  
17 transferred under a change of ownership?

18 A. That's correct.

19 Q. Now, in the summary opinion, if go back to page 7, your  
20 statement of opinion, summary of opinion in the paragraph that  
21 we were looking at before about the debtor's privacy policies  
22 states that the CPO cannot conclude with certainty that the  
23 sale of the company's data in bankruptcy is otherwise  
24 consistent with its privacy policies, particularly for those  
25 customers who created their accounts before 23andMe privacy

Neil Richards - Cross

1 statement was amended in June of 2022 to expressly note a  
2 potential for a sale of customer data in bankruptcy. Did I  
3 read that correctly?

4 A. Yes.

5 Q. And that's, you describe, a very carefully worded  
6 opinion?

7 A. Yes.

8 Q. In reaching that opinion, your opinion is based on the  
9 privacy policy as you conceived it and described it in the  
10 first part of that paragraph, correct, to not just include the  
11 privacy statement; is that fair?

12 A. To not include just the privacy? That's correct. My  
13 review -- my understanding is it says in the paragraph is to  
14 interpret the debtor's privacy policies broadly to include  
15 more than just the twenty-two versions of the 23andMe privacy  
16 statement.

17 Q. And you differentiate in some fashion in the sentence  
18 between the language as it existed after June 8, 2022, and the  
19 language that existed before, correct?

20 A. Yes.

21 Q. And the change in control language as it existed  
22 before -- I'm sorry, as it existed on June 8, 2022, is the  
23 same as the current language in the change in control  
24 paragraph, correct.

25 A. I'm sorry. That was a lot of -- a lot of words

Neil Richards - Cross

1 altogether. I'm not trying to fight you, Counsel. I just  
2 want to be precise so that my evidence is accurate for the  
3 Court.

4 Q. In the change in control chart that we looked at in  
5 Appendix C, the language as it existed on June 8, 2022, is the  
6 same as it has been subsequently, including the debtor,  
7 correct?

8 A. I think it's slightly different. Before June 8th, 2022,  
9 it says, "In the event that 23andMe go through a business  
10 transition such as a merger, acquisition by another company,  
11 or sale of all or a portion of its assets, your personal  
12 information will likely be among the assets transferred." And  
13 then in the subsequent one it says, "If we're involved in a  
14 bankruptcy, merger, acquisition, reorganization, or sale of  
15 assets, your personal information may be accessed, sold, or  
16 transferred as part of that transaction, and this privacy  
17 statement will apply to your personal information as  
18 transferred to the new entity." So the language is different.

19 Q. But my question is, the language as it existed starting  
20 on June 8th has been the same language subsequently? That's  
21 my question.

22 A. Oh, yes. I'm sorry. I misunderstood your question.

23 Q. That's okay. So the -- you attach some significance in  
24 your report to the inclusion of the word, bankruptcy, after  
25 June 8th, 2022, right --

Neil Richards - Cross

1 A. Yes.

2 Q. -- for analysis? If you were looking only at the  
3 language of the privacy statement as it existed on that date  
4 and includes the word, bankruptcy -- you would agree we are in  
5 a bankruptcy case, correct?

6 A. That's my understanding, Counsel.

7 Q. Okay. And if that was the only policy, if that was the  
8 only paragraph you were looking at, that is consistent with a  
9 transaction as proposed here, correct, just that language?

10 A. I -- so I want to be very careful here, Counsel. I -- my  
11 opinions offered in my report were offered as of June the 11th  
12 of this year, before I knew that TTAMX was going to be the  
13 presumptive -- the successful bidder in the second auction and  
14 before I had ever heard the term equity total.

15 Q. Okay.

16 A. And so I want to -- you know, I think it's important to  
17 time locate the report versus where we are right now in the  
18 transaction.

19 Q. All right. Fair enough. But you do attach significance  
20 in your report to the inclusion of the bankruptcy word that  
21 began June 8th, 2022; is that fair?

22 A. Yes.

23 Q. You are not -- going back to your opinion about what the  
24 privacy policy is, you're not excluding from the debtor's  
25 privacy policy, as you conceptualize it, the language that is

Neil Richards - Cross

1 in the privacy statement, are you?

2 A. No.

3 Q. It's one of the things that you consider among others?

4 A. It is. As I note in my report and as Professor Cate  
5 noted this morning, few, if any, consumers would have read  
6 this. And moreover, for the bankruptcy word, we know for a  
7 fact that one-third of 23andMe customers did not login -- have  
8 not -- at least as of June the 9th have not logged in in the  
9 three years since the word bankruptcy was added.

10 Q. But your conceptualization of the privacy policy includes  
11 statement in terms of service, but also all the other  
12 information that a consumer may see; is that fair? When you  
13 say you considered not just, in your opinion, the privacy  
14 statement?

15 A. So this is of course, as we both know, laid out in my  
16 report, but I considered the privacy -- the version of the  
17 privacy statement, the versions of the terms of use, the  
18 supplemental privacy statement for California and other state  
19 citizens, supplemental privacy statement for EU citizens, the  
20 23andMe.com/privacy page through which most consumers would  
21 perhaps access the privacy policy -- this privacy statement,  
22 rather, and 23andMe representations that were consumer facing  
23 more broadly consistent with the practice of regulators and  
24 academic research on how consumers actually understand privacy  
25 policies as a general term.

Neil Richards - Cross

1 Q. Okay. You didn't cite in your report any case law  
2 interpreting Section 363 of the Bankruptcy Code specifically  
3 in your assessment of what the police was; is that correct?

4 A. No, I did not.

5 Q. And you didn't independently take on the project of  
6 analyzing what Section 363(b) of the Bankruptcy Code requires,  
7 did you?

8 A. No. I thought it would be presumptuous to lecture this  
9 Court as a privacy scholar on what the Bankruptcy Code means.

10 Q. You did include some opinions in your report concerning  
11 the role of CPOs in other prior cases; is that fair?

12 A. Yes.

13 Q. And you, in fact, described a -- in your report, and this  
14 is on page 3, you say that the CPO mechanism has been sharply  
15 criticized in the academic literature as frequency producing  
16 only privacy theater in which there was an illusion of  
17 protection. So you include that critique in your report,  
18 correct?

19 A. Yes.

20 Q. And that includes a citation to some law review articles,  
21 correct?

22 A. It -- it does. Including by -- the leading ones are by  
23 now Bankruptcy Judge and formerly Professor Christopher  
24 Bradley.

25 Q. Right. And the privacy theater terms comes from the



Neil Richards - Cross

1 article that was written by now Judge Bradley, then Professor  
2 Bradley, correct?

3 A. Not originally, no.

4 Q. Well, that was -- it's the title of the article that you  
5 were quoting input --

6 A. Yes. But you asked me about the term. The concept of  
7 privacy theater is broader than Judge Bradley's critique of  
8 the CPO process in the past.

9 Q. Right.

10 A. And is sort of more general in the academic literature on  
11 privacy.

12 Q. And did you read that article with care?

13 A. Yes.

14 Q. You're familiar with what it says?

15 A. Yes.

16 Q. And are you --

17 A. I'm sorry. Counsel, there's two by Judge Bradley, but  
18 the theater one or privacy for sale?

19 Q. The theater one.

20 A. Yes.

21 Q. Are you familiar with the fact that there is some  
22 analysis in that article of what Section 363 does and doesn't  
23 allow?

24 A. Yes.

25 Q. Okay. And isn't it true that one of the conclusions

Neil Richards - Cross

1 expressed in that article is that the law, meaning Section  
2 363(b), only applies if the debtor has disclosed to an  
3 individual a policy prohibiting the transfer of personally  
4 identifiable information, if the policy is in effect on the  
5 date of a commencement of a case, and if the sale would  
6 violate it --

7 MS. MILLIGAN: I'm going to object, Your Honor. This  
8 question involves an article written by another person who is  
9 not here to testify about this article that it's not in  
10 evidence, and it's providing an analysis of what the  
11 interpretation of the law is, which is a constant concern in  
12 this case. And so my concern is hearsay, first, and then  
13 also, it's not relevant as far as what Judge Bradley, who I  
14 would note sits in Austin, his opinion as to 363, I'm not sure  
15 that Professor can attest to Judge Bradley's opinion that's  
16 expressed in a law review article.

17 THE COURT: Go ahead.

18 MR. CLAREMAN: Your Honor, I'm simply asking  
19 questions about the article that's cited in the report. It's  
20 regarding the report. That terminology used in the report.  
21 There's criticism of the CPO role in other cases in the report  
22 that's linked to this article. I'm simply asking -- testing  
23 the basis for the criticisms and the statements about the CPO  
24 role that is set forth in the report.

25 MR. FIRSENBAUM: Your Honor, two objections, first if

Neil Richards - Cross

1 the Court is going to allow any questions about this article,  
2 I'd ask the article be provided to the witness so the witness  
3 can understand the full context of what he's being asked  
4 about. He doesn't have it in front of him.  
5 Second of all, I don't think these questions are proper. Yes.  
6 The article is cited, but not for the proposition of what 363  
7 means or how the Court should interpret 363. It's for a  
8 different purpose. Just because you cite an article for one  
9 purpose doesn't mean you should be allowed to ask questions  
10 about legal conclusions that are outside the scope of the  
11 CPO's report simply because they're found elsewhere in the  
12 article. And so I think debtor's counsel and State's counsel  
13 are free to argue to the Court in their closings about what  
14 the law 363 is. There's no reason that this witness has to be  
15 peppered with questions about 363, which wasn't in the scope  
16 of the stipulated in an order assigning him his role and not  
17 in the scope of his report?

18 MR. CLAREMAN: The article is at Tab 5 in the binder.  
19 I only have a handful of questions on this topic. It is  
20 related to criticisms of the way the CPO role has been  
21 performed in past cases, and there was certainly decisions  
22 made about what to quote and not quote from the article that  
23 were made. And so I simply would like the opportunity to ask  
24 the witness a handful more questions about some of the  
25 analysis in that article.

Neil Richards - Cross

1 THE COURT: All right. I'll overrule the objection.  
2 We haven't gotten to the question yet. What is the law,  
3 Professor Richards, tell us what the law is. That's a  
4 different animal. We're still in preliminary matters about  
5 this article, so I'll allow Mr. Clements some leeway here.

6 MR. CLEMENTS: Thank you, Your Honor.

7 BY MR. CLEMENTS:

8 Q. Do you have the article in front of you? It's in that  
9 binder that I handed you. It's Tab 5. And if you go to page  
10 625. Are you there?

11 A. Yes, I was -- I was looking at the article to refresh my  
12 recollection and to make sure that I understood where in the  
13 professor/Judge Bradley situated the sentence.

14 Q. Okay. Well, the sentence as I read it, I'll repeat it,  
15 says, forth the law -- and this is referring to 363(b)(1) as  
16 you can see from the footnote, the law only applies if the  
17 debtor has disclosed to an individual a policy prohibiting the  
18 transfer of personally identifiable information. If the  
19 policy is in effect on the date of the commencement of the  
20 case, and if the sale would violate it. Did I read that  
21 correctly?

22 A Yes.

23 Q Okay. And you didn't quote that in report in your report  
24 or cite to that language in your report, correct?

25 A No.

Neil Richards - Cross

1 Q And you didn't do your own analysis of Section 363(b),  
2 correct?

3 A Of course not.

4 Q. And you're not --

5 A. I took paragraph 3 of the -- of the joint order and  
6 stipulation as my assignment. And I tried to discharge that  
7 assignment to the best of my ability. And I did not see a 363  
8 analysis or indeed any substantive analysis of bankruptcy law  
9 in that paragraph.

10 Q. Okay. And you're not offering any disagreement with that  
11 characterization as set forth in the article?

12 A. I'm -- I'm here to talk about my report, and my report  
13 does not engage with 363.

14 Q. Okay. Well, isn't it true that this article is, in fact,  
15 leveling criticisms at the way that Section 363 is drafted in  
16 part? There are other criticisms too, but this is actually a  
17 criticism of the law and the way that the statute is written;  
18 is that fair?

19 A. It's my understanding that Judge Bradley is -- is  
20 concerned about the -- the overarching structure of -- of the  
21 extent to which 363 structures the CPO process. But that was  
22 not part of my review --

23 Q. Okay.

24 A. -- for my report.

25 Q. You would agree that whatever disagreements we might have

Neil Richards - Cross

1 with the law or the policy of the law, we should follow the  
2 law, correct?

3 MR. FIRSENBAUM: Objection, Your Honor.

4 MR. CLEMENTS: Is that a controversial question?

5 MR. FIRSENBAUM: Well, this is just asking the  
6 witness about 363, whether the Court should follow 363. It's  
7 outside the scope of his report.

8 THE COURT: I'll sustain that objection.

9 MR. CLEMENTS: Okay. All right. Nothing further.

10 THE COURT: Let's keep going.

11 MR. CLEMENTS: Thank you.

12 THE COURT: Thank you.

13 Additional cross?

14 MR. LARKIN: Good afternoon, Your Honor. Joe Larkin  
15 from Skadden, Arps on behalf of the TTAM parties and Ms.  
16 Wojcicki.

17 CROSS-EXAMINATION

18 BY MR. LARKIN:

19 Q. Good afternoon, Professor Richards.

20 A. Good afternoon.

21 Q Just have a few questions for you. Give me one moment.

22 I just want to take a step back for a moment. Spent a lot of  
23 time with your report, sir. And you discussed the issue of  
24 consent quite a bit in your report. Sir, do you believe that  
25 individuals have the capacity to make their own choices?

Neil Richards - Cross

1 A. We just avoided one open-ended question to a law  
2 professor, and you've given me another one. I would say that  
3 that is a complicated question that does not admit to a yes/no  
4 answer, particularly given some of the literature on  
5 behavioral economics. But I want to keep things on track  
6 here. So I will say that's a complicated question.

7 Q. Okay.

8 A. And it depends to --

9 Q. Fair enough.

10 A. -- to repair to something Mr. Cate said this morning.

11 Q. Okay. With respect to 23andMe, okay? Is it fair to say  
12 that all of 23 customers were given the opportunity to review  
13 the company's privacy policy before they consented to it?

14 MR. FIRSENBAUM: I'm going to object to that  
15 question, if you could formulate it as to his understanding.  
16 He's not a fact witness.

17 MR. LARKIN: That's a fair request.

18 THE COURT: Sure.

19 MR. LARKIN: I'll rephrase, Your Honor.

20 THE COURT: Okay.

21 BY MR. LARKIN:

22 Q. Professor Richards, is it your understanding based on  
23 done your detailed analysis that you undertook over the last  
24 five weeks that a customer of 23andMe is given the opportunity  
25 to review the company's privacy policies and has to consent,

Neil Richards - Cross

1 has to opt in to those policies to become a 23 customer?

2 A. I think, Counsel, that certainly, so -- so there might be  
3 some -- some factual uncertainty about the extent to which the  
4 initial interface by which customers sign up to 23andMe might  
5 have changed over time. I did not review that back to 2006.

6 But it is my understanding that assuming that that is the  
7 case, and I do not have a reason to believe that it is not the  
8 case, that the interface, like many interfaces on the  
9 internet, does provide links to the privacy statement and the  
10 terms of use, but not the other privacy policies, including  
11 some of the ones that I talk about in my report. And that  
12 consumers have an opportunity to view them -- those two, those  
13 two pieces of the policy --

14 Q. Uh-huh.

15 A. -- before they sign up for an account. But it is also my  
16 view to put this in -- in context based upon twenty-five years  
17 of studying this kind of behavior, that consumers don't and  
18 everyone knows that consumers don't. In fact, Professor Cate  
19 said the same thing this morning. So while there is an  
20 opportunity for consumers to review, I think the -- the  
21 consensus of the academic literature, the consensus of my --  
22 the results of my study of these questions for approximately a  
23 quarter of a century, and the consensus of my findings in my  
24 examination of 23andMe's policies in particular, is that  
25 consumers, on the whole, do not. And that 23andMe does not



Neil Richards - Cross

1 track that information, much less make them click through the  
2 terms of the privacy statement in terms of use, as is done  
3 for, for example, the research consensus.

4 Q. Consumers don't as a factual matter, but they certainly  
5 have the opportunity to. And you're not questioning the fact  
6 that 23andMe customer has to give its consent by clicking the  
7 box before they can become a 23andMe customer, correct?

8 A. Well, consent being a legal conclusion, I think we can --  
9 we can contest what is consent. But in the interest of  
10 finding common ground, it is my opinion that the -- the  
11 interface requires customers to click those boxes --

12 Q. Thank you.

13 A. -- before they click the bigger box.

14 Q. And it's also your understanding that -- is it your  
15 understanding, sir, that a 23andMe customer retains the right  
16 to opt out of being a 23andMe customer at all times?

17 A No.

18 Q. No? Were you in court on Wednesday?

19 A. Yes.

20 Q. Okay. And you recall the Court asked counsel for the  
21 State of Texas if the proposed sale altered the right of each  
22 of the 850,000 citizens of the State of Texas to delete their  
23 23andMe accounts at any time. Do you recall that line of  
24 questioning?

25 A Yes.

Neil Richards - Cross

1 Q Okay. If the sale is approved, is it your understanding,  
2 sir, that the existing customers of 23andMe will not retain  
3 the right to delete their accounts?

4 A It's -- it's my understanding under the -- under -- it's  
5 my understanding. Under my understanding of the revised APA  
6 that the right is there, but for -- for example, dead  
7 customers -- it's difficult for -- I mean, what is the old  
8 line? The dead men tell no tales. Dead men also can't really  
9 opt out from internet services. And that was the reason for  
10 my no answer to your first question.

11 Q. Let me ask you about some of the protections and  
12 enhancements that TTAM has agreed to as part of its proposed  
13 acquisition of 23andMe, okay?

14 MS. MILLIGAN: Your Honor, we received a written objection  
15 to ask anything out of the scope of his report. And I think  
16 these are most certainly out of the scope of his report. And  
17 so I don't know that he has an opportunity to testify as to  
18 something that he did not study and provide as part of his  
19 report.

20 MR. LARKIN: Okay.

21 THE COURT: Mr. Larkin?

22 MR. LARKIN: Your Honor, on direct, Professor  
23 Richards testified that he was aware of the enhancements that  
24 had been agreed to by TTAM in the proposed asset purchase  
25 agreement; that he hadn't read the asset purchase agreement

Neil Richards - Cross

1 that was filed with the Court on June 13th. I was simply  
2 going to ask the professor a couple of questions about those  
3 enhancements since he did, in his report, provide an opinion  
4 on -- I can just go to it. Professor Richards says in  
5 addition, the winning bidder should publicly commit to adhere  
6 to certain privacy and security standards with regard to the  
7 personal information they obtained from the acquisition of the  
8 company's assets. That's at Richards report at 10. I'm  
9 simply going to ask the professor whether he was aware of the  
10 additional enhancements that TTAM had agreed to that seemed  
11 consistent with that recommendation in his report.

12 THE COURT: Well, the first part of your question is  
13 certainly fine if he's aware of them. Let's start there and  
14 let's see where it goes, Mr. Larkin.

15 MR. LARKIN: Fair enough.

16 BY MR. LARKIN:

17 Q. Let's start there, Professor Richards, page 10 of your  
18 report, you say, publicly available privacy and security  
19 commitments. Let me know when you're there, sir.

20 A Yes.

21 Q Great. So you say, in addition, the winning bidder  
22 should publicly commit to adhere to certain privacy and  
23 security standards with regard to the personal information  
24 they obtained from their acquisition of the company's assets.  
25 Do you see that?

Neil Richards - Cross

1 A. I do.

2 Q. Okay. Professor Richards, are you aware that TTAM has  
3 agreed to adhere to certain privacy and security standards  
4 with regard to the personal information it may obtain from its  
5 acquisition of the company's assets?

6 A Depending upon what you mean by aware, yes.

7 Q Okay. And you haven't reviewed the asset purchase  
8 agreement that was agreed to by TTAM, correct?

9 A I -- I believe I said that I've not read it in its  
10 entirety, but that I had seen the voluntary commitments.

11 Q Okay. And sir, did those voluntary commitments address  
12 your concerns?

13 A No.

14 Q Okay.

15 A. But I'm happy to explain why.

16 Q. Well, one of the concerns that you also raised in your  
17 report, your report includes a discussion of the objections  
18 filed by the twenty-eight states to the proposed sale of  
19 23andMe, correct?

20 A. Can you point me to the --

21 Q. Do you recall that? Sure.

22 A. I believe it's in there, but as -- as I'm sure you're  
23 aware, counsel, it's a very long report.

24 Q. Yeah. It's page 75, and I have another question related  
25 to that, sir.

Neil Richards - Cross

1 A. Okay.

2 Q. Okay. And you raised the concern -- I'm sorry, you  
3 raised the objections filed by the twenty-eight states in your  
4 report. And one of the other issues that you raised with  
5 respect to TTAM is that TTAM is organized as a nonprofit  
6 medical research organization. And you had concerns that TTAM  
7 may not have to comply or may not be subject to certain state  
8 privacy laws that are only applicable to for-profit  
9 corporations, correct, sir?

10 A State and federal.

11 Q Okay. Are you aware as you sit here today, Professor,  
12 that TTAM, pursuant to the APA, has agreed to comply with all  
13 obligations under applicable state privacy laws, including  
14 those governing genetic privacy and consumer health privacy,  
15 as if it were a for-profit entity?

16 A. Yes, I believe that was discussed in this morning's  
17 testimony, Professor Cate.

18 Q. Right, it was discussed by Professor Cate. I'm asking  
19 you if you were aware of that, sir?

20 A. I am aware of that representation, yes.

21 Q Okay. With respect to the settlement now that has been  
22 reached with the states, you raised the issue in your report  
23 of the objections filed by the twenty-eight states to the  
24 proposed sale of 23andMe, correct?

25 A. It's I think -- this is on page 75?

Neil Richards - Cross

1 Q. Correct.

2 A. The report says twenty-four, but I know that number  
3 has --

4 Q. Fair enough.

5 A. -- had some fluctuation.

6 Q. It has. I would agree to that. Are you aware,  
7 Professor, that at least as of this morning, I believe, we  
8 have twenty-three states have agreed not to oppose the sale of  
9 23andMe to TTAM pursuant to the APA that was filed with the  
10 Court on June 13th?

11 MS. MILLIGAN: I'm going to object to that question  
12 first. Again, beyond the scope of his report. He reviewed  
13 the transaction that was pending at the time of his report.  
14 And also, I think the agreement with the states -- and I see  
15 Ms. Ryan behind me -- may be mischaracterized.

16 MR. LARKIN: May I respond, Your Honor?

17 THE COURT: Let's let Ms. Ryan.

18 MS. RYAN: You can go right ahead.

19 MR. LARKIN: Okay, go ahead.

20 MS. RYAN: Oh. Good afternoon. Abigail Ryan for the  
21 National Association of Attorneys General, United Client  
22 States.

23 While we've reached a meeting of the minds of some of  
24 the protections in Exhibit D, there is not a formal settlement  
25 per se. As you've noticed, I have not pursued cross-examining

Neil Richards - Cross

1 or calling witnesses. And we are standing on our pleadings,  
2 but our objection is not withdrawn. And so I think  
3 characterizing it as a settlement is probably a bridge too far  
4 right now. It's an agreement, I would think. Fair enough?

5 MR. LARKIN: I agree with Ms. Ryan. I was simply  
6 asking Professor Richards whether he was aware, and I'm happy  
7 to quote directly from the pleadings.

8 THE COURT: Well, let's start over. Okay? The --  
9 page 75 is talking about the State's motion for appointment of  
10 CPO.

11 MR. LARKIN: Correct.

12 THE COURT: It's not talking about their objection to  
13 the sale.

14 MR. LARKIN: Yeah.

15 THE COURT: So I think the foundation here is a  
16 little off.

17 MR. LARKIN: Fair enough.

18 BY MR. LARKIN:

19 Q. Professor, I'll start over. Professor, are you aware  
20 that a number of the states who originally filed objections to  
21 the proposed sale have filed papers with the Court agreeing  
22 not to oppose the sale of 23andMe to TTAM as it's currently  
23 structured?

24 A. Yes, I believe Ms. Ryan just informed us of that, but --  
25 but -- but I was aware. I was generally aware before you

Neil Richards - Cross

1 asked this question.

2 Q. Have you reviewed that filing, sir?

3 A I have -- which filing in particular?

4 Q. Have you reviewed the filing? I'm happy to provide you  
5 with a copy?

6 A. It's my understanding there have been several that have  
7 come through over the past couple of days. And --

8 Q. This is at docket 823.

9 MR. LARKIN: May I approach, Your Honor?

10 THE COURT: Sure. Sure. Thank you.

11 BY MR. LARKIN:

12 Q. Professor, this is the pleading I just referenced, which  
13 is the State's first supplemented docket Number 803 (sic).

14 A. Can I ask when this was filed?

15 Q. This was filed yesterday, sir.

16 A. Okay. Thank you.

17 Q. Could you turn to paragraph 3 for me?

18 A. Okay.

19 Q. Okay. Could you read that paragraph for me, sir?

20 A. Under Roman numeral II?

21 Q. Yes.

22 A. The State's position as to this particular transaction  
23 with TTAM is not incongruent with their pending objection and  
24 complaint, including because this particular buyer is arguably  
25 an affiliate footnote of the debtors and not a third party.



Neil Richards - Cross

1 Q. Goes on to say, sir, furthermore, there's no actual  
2 physical or electronic transfer or disclosure of any DNA or  
3 other customer material or data. The states recognized that  
4 all the customers previously entrusted their data with  
5 23andMe. That initial consent appears applicable to this  
6 proposed transaction of 23andMe into a nonprofit form. Do you  
7 see that, sir?

8 A. I do.

9 Q Okay. Were you aware that that had been filed before you  
10 took the stand today?

11 A. I had a general awareness of it, but I had not subjected  
12 it to -- to study of the sort that the documents I cited and  
13 relied on in my CPO report had that level of study.

14 Q. And you're not second guessing the judgments of the  
15 states that have filed this pleading with the Court, correct?

16 MR. FIRSENBAUM: Objection, Your Honor. This is well  
17 beyond the scope of this report. It's about events that have  
18 taken place after his report. I reached agreement with the  
19 debtors that he wasn't offering opinions beyond the scope of  
20 his report, and now we're being asked for opinions based on  
21 events from yesterday. I object.

22 THE COURT: Response?

23 MR. LARKIN: I'll withdraw the question, Your Honor.

24 THE COURT: The question is withdrawn.

25 MR. LARKIN: I have no further questions for this



Neil Richards - Cross

1 witness. Thank you.

2 MS. RYAN: Again, Abigail Ryan, for the National  
3 Association of Attorneys General Client States.

4 A couple of clarifications on what was just read into  
5 the record, paragraph number 3 of docket Number 823. The  
6 State of North Carolina dropped a footnote that they actually  
7 would not sign on to that one paragraph. The other states  
8 signed on to the entire pleading. However, the history behind  
9 where that pleading came from, I think is pertinent to  
10 testimony that's been put on the record, and it was only  
11 agreed to after the states and TTAM had further negotiations  
12 about the Exhibit D and the protections. And through further  
13 concessions that are now put into Exhibit D and will be filed  
14 with the Court, the states that signed on would benefit by  
15 those further concessions. If we did not sign on, we would  
16 not benefit from those concessions. And so I think protecting  
17 our citizens and being able to work cooperatively is  
18 important. And so that didn't come out of -- it wasn't made  
19 up out of whole cloth. We didn't all of a sudden switch our  
20 position. We made a decision to make that agreement, stand  
21 down on cross-examining or calling witnesses. And if Your  
22 Honor chooses to approve the sale, overrule our objection, as  
23 it applies to TTAM.

24 THE COURT: Sure, I understand. Thank you.

25 MS. RYAN: Thank you.

Neil Richards - Redirect

1 THE COURT: Additional cross before we go to  
2 redirect? Any additional cross? Okay. Sorry.

3 You were right, Ms. Milligan.

4 MS. MILLIGAN: Thank you, Your Honor.

5 THE COURT: Redirect.

6 REDIRECT EXAMINATION

7 BY MS. MILLIGAN:

8 Q. Professor, you testified that the additional privacy and  
9 agreements that TTAM have posted in the most recent APA do not  
10 address your privacy concerns; is that correct?

11 A. I think the question was slightly different --

12 Q. Okay.

13 A. -- when it was posed to me, but in general sense, yes, I  
14 would agree with that statement.

15 Q Why not?

16 A Well, I -- I think it's difficult for me to opine upon  
17 them without them in front of me, but as I -- as I recall  
18 them -- and I recall some of Professor Cate's testimony this  
19 morning, many of them would appear to be -- to -- to offer  
20 rights or opportunities that are already guaranteed by  
21 existing federal and state law. Particularly, state so-called  
22 comprehensive privacy statutes, state genetic privacy  
23 statutes, federal and state unfair and deceptive trade  
24 practice jurisdiction, among other things that I talk about in  
25 the -- the legal overview section of my CPO report.

Neil Richards - Redirect

1 Particularly though, with respect to the Privacy Advisory  
2 Board, that is something that I -- that -- that since you have  
3 asked me about it, I would -- I would offer an opinion rooted  
4 in my study of these practices and my understanding of the  
5 literature on privacy, compliance. And it's that privacy  
6 advisory boards are not always the benefit that they seem to  
7 be. In my colloquy with -- with our colleague from Skadden  
8 representing TTAM, I was asked about privacy theater. And as  
9 I -- as I testified then, that is a general term that we see  
10 in the academic literature discussing corporate privacy  
11 practices. And I think advisory boards are one -- another of  
12 those areas which can result in privacy theater. Privacy  
13 theater being as -- as Judge Bradley points out in his  
14 invocation of the term from the broader literature in his  
15 article, something that produces the illusion of a benefit but  
16 actually can be -- can be under protective of privacy.  
17 So for example, I believe in that paragraph, I think it's  
18 Roman II of that paragraph of the APA which discusses a  
19 privacy advisory board, no details are given on the  
20 composition. I believe Ms. Wojcicki testified on Wednesday  
21 that there would be three members of the advisory board. But  
22 many privacy advisory boards are staffed by compliant  
23 individuals who will perhaps rubber stamp corporate practices.  
24 And even if they offer sort of good faith consumer advocacy as  
25 a sounding board, there's no guarantee that those concerns

Neil Richards - Redirect

1 will be -- will be adopted. And there's -- there's a history  
2 of advisory boards being -- being ineffective as cited in the  
3 literature by -- by Waldman (ph.), the literature cited by  
4 Bradley in his article on theater and others.

5 Q. Okay. Thank you.

6 MS. MILLIGAN: No further questions.

7 THE COURT: Redirect from California?

8 MR. NADAL: None, Your Honor.

9 THE COURT: All right. Thank you, Professor  
10 Richards, you may step down. Were you here yesterday when I  
11 thanked you for your hard work? I didn't know who --

12 THE WITNESS: Yes, it was very kind, Your Honor.

13 THE COURT: Okay. All right. Thank you, again.

14 Other witnesses from the objecting states?

15 MS. MILLIGAN: No further witnesses for the State of  
16 Texas.

17 MR. NADAL: No further witnesses for the State of  
18 California.

19 THE COURT: Any other objecting states? All right.

20 So we have a few other objections besides those from  
21 the states. We have some housekeeping to do. We have some  
22 arguments to make.

23 Hopkins, how do you suggest we tackle these best?

24 MR. HOPKINS: Your Honor, Chris Hopkins of Paul  
25 Weiss, co-counsel to the debtor, for the record.

Colloquy

1 I'm happy to proceed however Your Honor would prefer.  
2 I'm prepared to go into argument. I'm prepared to address the  
3 kind of what I'll call not in terms of importance, but the  
4 ancillary objections that we have that don't involve the  
5 objecting states. Whatever Your Honor would like.

6 THE COURT: Why don't we wrap up the objections and  
7 then talk about the scope of what's left and do some  
8 arguments?

9 MR. HOPKINS: That sounds good, Your Honor.

10 THE COURT: All right.

11 So is Mr. Neal in the courtroom or on the Webex?  
12 David Neal? All right. I'll resolve Mr. Neal's objections on  
13 the papers.

14 Pamela Norton, are you with us? I'll resolve her  
15 objections on the papers.

16 Jerry Makin, are you with us? I'll resolve his  
17 objections on the papers.

18 Intellectual Property Scholars? Counsel appeared  
19 yesterday.

20 MR. LINDSAY: Yes, Your Honor, this is Michael  
21 Lindsay representing the Scholars.

22 THE COURT: Yes. Please proceed.

23 MR. LINDSAY: Thank you, Your Honor. First of all, I  
24 wanted to describe what we are not here objecting to. We did  
25 not address any agreements with existing licensees who are in

Colloquy

1 a position to make whatever objections they wish to make.

2 We are not addressing privacy issues or the  
3 determination of the highest and best offer.

4 And we are not addressing the more recently filed  
5 amicus brief by a different group of scholars.

6 The interest that the scholars have is, first of all,  
7 that a number of them are themselves customers of 23andMe who  
8 have contributed their genetic data and have consented to  
9 research. They have an interest in making sure that that data  
10 set continues to exist and continues to be used to advance  
11 medical research. Their interests specifically are to ensure  
12 that biomedical research as to genomic information advances  
13 science for the benefit of public health and to preserve the  
14 wishes of those who, like themselves, have consented to use  
15 for research.

16 This is an overwhelming interest, I believe. There  
17 was testimony this morning from Professor Cate that something  
18 on the order of eighty-one percent of 23andMe customers have  
19 consented to research use. That is consistent with the  
20 scholar's discussion in their objection of people's motivation  
21 for public research.

22 We recognize, of course, that individuals should have  
23 the ability to delete their own data. This does remain a  
24 matter of choice for each individual, but that is not in and  
25 of itself a mechanism that would help the scholars achieve the

Colloquy

1 interests that they are seeking to protect, namely, the  
2 ability for that data set to exist for the benefit of public  
3 research.

4 We recognize that TTAM has stated that it will  
5 continue its policy as to academics. We do not yet see that  
6 in a sales order and would like to see it there. We also note  
7 that in Ms. Wojcicki's declaration she states an intention to  
8 continue the prior policies of advancing public health  
9 benefits through partnerships with third-party researchers,  
10 which is at least a step toward avoiding what we would call  
11 the monopolization or enclosure of the data. That's in  
12 paragraph 17 and 19 of her declaration, which is at docket  
13 778. The scholars applaud that intention. But again, we  
14 would like to see that memorialized within the sale order.

15 We proposed specific language both to debtor's  
16 counsel and to TTAM. The response that we received from  
17 debtors was that they would defer to TTAM. The response that  
18 we received from TTAM was that the language was not  
19 acceptable. We followed up with a request for the reasoning  
20 so we could try to reach a mutually acceptable resolution. We  
21 received no further response.

22 THE COURT: All right, Mr. Lindsay --

23 MR. LINDSAY: So accordingly --

24 THE COURT: Mr. Lindsay, let me come to the point  
25 here.



Colloquy

1 MR. LINDSAY: Yes.

2 THE COURT: What is it --

3 MR. LINDSAY: Yes.

4 THE COURT: -- that you want that TTAM is not willing  
5 to provide and what authority do I have to make that happen?

6 MR. LINDSAY: You have, first of all, specifically,  
7 what we want is language in the order. And I can read it to  
8 you in a moment or submit it now through the docket. But the  
9 basic idea is that it would impose a legal obligation on TTAM  
10 to make licenses available to academics on a royalty free  
11 basis and to any bona fide applicants for research licenses  
12 other than academics on a reasonable and nondiscriminatory  
13 basis. That's what we are asking for.

14 Your authority is that the data was provided to  
15 23andMe in the first place with that intention in mind. As  
16 Professor Cate testified, the vast majority of data providers  
17 have consented to research. We want to ensure that that  
18 continues.

19 THE COURT: All right.

20 Mr. Hopkins?

21 MR. HOPKINS: Your Honor, we applaud the goals of Mr.  
22 Lindsay's clients. I think he said some have contributed data  
23 to the debtors in connection with receiving services from  
24 23andMe. Presume that means not all. So to the extent he  
25 represents clients who are not customers of 23, are not

Colloquy

1 23andMe -- not creditors of 23andMe, not equity holders of  
2 23andMe, I don't think they have standing to object to the  
3 sale.

4 THE COURT: Well, he's here for the rest of them. So  
5 let's take up the merits.

6 MR. HOPKINS: With respect to the request that TTAM  
7 provide an asset that it is acquiring for value to them on  
8 commercial terms that they dictate, I'm not aware of any  
9 authority under the code to make a buyer do that. TTAM has  
10 made some concessions in this regard with respect to the  
11 privacy enhancements that they've agreed to put in the APA.  
12 And I think that Mr. Lindsay's clients are free to reach out  
13 to TTAM post-closing to negotiate whatever kind of information  
14 sharing arrangement they wish and that TTAM is willing to  
15 agree to in its commercial judgment.

16 THE COURT: Okay.

17 Mr. Lindsay, rebuttal?

18 MR. LINDSAY: Yes, Your Honor. The Court is making  
19 some decisions based upon representations that TTAM has made,  
20 both in its reply brief and in Ms. Wojcicki's declaration. We  
21 are asking that the Court hold TTAM to that by placing those  
22 conditions within the sale order.

23 THE COURT: Okay. I'll take that under advisement  
24 and rule on that along with the ones -- the pro se objections  
25 we just discussed.

Colloquy

1 MR. HOPKINS: I would note for the record and for  
2 Your Honor, for Mr. Lindsay, the term sheet is part of the APA  
3 that's being approved under the sale order. So that is a term  
4 of the sale that the Court is approving and that will be  
5 binding on TTAM.

6 THE COURT: Right. And if there are other  
7 commitments that have been made through side discussions  
8 between the scholars and TTAM, those are private agreements as  
9 far as I'm concerned. Okay.

10 MR. HOPKINS: That's our understanding as well, Your  
11 Honor.

12 THE COURT: Okay.

13 Sonia Herb? Ms. Herb, are you with us? All right.  
14 I'll rule on that objection on the papers.

15 Ms. Eichele? Heard from Ms. Eichele this morning and  
16 perhaps that has resolved her objection. In any event, I'll  
17 rule on that on the papers.

18 Others, Mr. Sant, are you and your clients are new to  
19 this matter? Mr. Sant, your papers are filed as an amicus  
20 brief, but read like an objection. So --

21 MR. SANT: Yes, Your Honor.

22 THE COURT: -- are your client's parties-in-interest?

23 MR. SANT: They are parties-in-interest, Your Honor.  
24 My clients consist of a number of scholars, some of whom are  
25 actually customers. They're involved in formation of the

Colloquy

1 Global BioData Trust. And there have been various customers  
2 of 23andMe that have asked that trust to get involved on their  
3 behalf. And my clients are ultimately quite concerned about  
4 treatment of bio data as a commodity and the super importance  
5 of treating that data properly over simply commoditizing and  
6 monetizing the information that all of these customers have  
7 provided to the debtors.

8 What they're seeking, Your Honor, they would like  
9 some more time, of course, because we've only filed a brief at  
10 this point. But they're quite concerned that any sale takes  
11 into account the proper treatment of this data. And there's  
12 continuing concerns -- not -- it's impossible, really, in  
13 order to put a fence around all of the rights and protect all  
14 of these rights of all these people. It's impossible also for  
15 them to have meaningfully consented. So what they're seeking  
16 is to have basically the Global Trust appointed as a  
17 continuing body to protect the very important genetic  
18 information that's been provided.

19 THE COURT: All right. And what authority do I have  
20 to do that, Mr. Sant?

21 MR. SANT: Well, Your Honor, first of all, I think  
22 under 363, you can condition a sale on whatever's required to  
23 protect the interests of the party in interest.

24 THE COURT: And have you talked to TTAM about whether  
25 they'd agree to that or whether they would terminate the --

Colloquy

1 MR. SANT: I have not, Your Honor.

2 THE COURT: -- \$305 million --

3 MR. SANT: I've been involved in this, and we'd of  
4 course like the opportunity to talk with them further. The  
5 concerns that we have are that this is essentially the same  
6 group under which huge data breaches have already occurred.  
7 And we'd like the opportunity to talk further, but we're quite  
8 concerned about the identity of the purchaser being virtually  
9 the same as the seller, under which there were severe data  
10 breaches, et cetera.

11 THE COURT: All right.

12 Mr. Hopkins?

13 MR. HOPKINS: Your Honor, I would make a couple  
14 points. Global Data Trust was actually a bidder in this  
15 process. So the notion that there was not sufficient time to  
16 appear and raise whatever substantive objections they would  
17 like, I think I take issue with that. A losing bidder does  
18 not have standing by virtue of being a losing bidder. The  
19 objection deadline was June 10th. The amicus brief was filed  
20 after June 10th, and I'm not hearing a substantive objection  
21 to the sale, other than that Global Data Trust would desire  
22 that the debtors were seeking approval of some other form of  
23 transaction than what we in our business judgment are seeking  
24 approval of today.

25 THE COURT: Mr. Sant, briefly?

Colloquy

1 MR. SANT: Well, Your Honor, we are saying that the  
2 sale should not go through unless and until there can be  
3 satisfactory protections for this very important data. And  
4 we're saying that the sale as proposed doesn't provide those  
5 protections.

6 THE COURT: Okay. Thank you. I'll take that  
7 objection/amicus brief under advisement, and I'll rule on that  
8 in due course.

9 Are there other parties who have objected that I have  
10 overlooked in the courtroom first?

11 All right. On the Webex?

12 Okay. We've heard from everyone, so we need a little  
13 bit of argument. But a couple of housekeeping matters, and we  
14 don't -- maybe I'll rattle these off and then parties can  
15 respond to them. Everybody got out their pens, I saw.

16 So first of all, want to clarify which states remain  
17 in what I'll call active opposition, Ms. Ryan, as opposed to  
18 the states who have inactive opposition.

19 And then what do you anticipate, Ms. Ryan, that I  
20 should do as to the inactively opposing states? For example,  
21 you're retaining your objection. Are you nevertheless asking  
22 me to rule state by state on the various statutes of those  
23 twenty-however many states even though they're not here  
24 actively opposing the sale?

25 MS. RYAN: No, Your Honor, I'm not asking for that.

Colloquy

1 Just a general to the extent that this objection applies to  
2 TTAM, it's summarily overruled would be fine.

3 THE COURT: Understood. Okay. Thank you.

4 MS. RYAN: Thank you.

5 THE COURT: That clarifies that.

6 So for -- yes, ma'am?

7 MS. JORDAN: Excuse me, Your Honor. Dalila Jordan,  
8 with the State of Minnesota representing the People of  
9 Minnesota.

10 THE COURT: Yes.

11 MS. JORDAN: We just also wanted to go on record and  
12 say that our state is continuing to hold its objection and its  
13 subsequent adversary. But we do -- we did file a first  
14 supplemental, as the Court has recognized, agreeing to the  
15 sale of TTAM. But we -- and in the event if you overrule, if  
16 you confirm the sale, we want to preserve our objection to the  
17 backup bidder.

18 THE COURT: Understood.

19 And so you're with Ms. Ryan on that in other words?

20 MS. JORDAN: We have signed the NAAG state objection.

21 THE COURT: Got it. Okay.

22 MS. JORDAN: But Ms. Ryan doesn't represent the State  
23 of Minnesota.

24 THE COURT: Yes. That's right. Okay.

25 MS. JORDAN: Thank you.

Colloquy

1 THE COURT: Very good. Thank you.

2 MS. ESBECK: Alison Esbeck, representing the State of  
3 Missouri for the Missouri Attorney General's Office.  
4 Basically, ditto. I just wanted to be on the record.

5 THE COURT: Sure.

6 MS. ESBECK: As Ms. Ryan also does not represent the  
7 State of Missouri, but we are in agreement with the TTAM  
8 proposal and the protections that have been put in place with  
9 regards to privacy and cybersecurity, but are not withdrawing  
10 that objection. And again, would obtain it to the extent that  
11 the backup bidder becomes in play in this matter.

12 THE COURT: Understood. Understood.

13 MS. ESBECK: Thank you.

14 THE COURT: Thank you, Ms. Esbeck.

15 All right. So then for those states that remain in  
16 active opposition, can I have some clarification about which  
17 legal theories and statutes remain at issue? For example, I  
18 haven't heard word one about the common law right of ownership  
19 or control. If that's still in play, I need to know it. If  
20 that's not part of the act of opposition, please clarify that  
21 for me.

22 The Federal Trade Commission Act, the State Uniform  
23 Deceptive Trade Practices Acts. Are those still in play?

24 959(b), is that still part of anyone's active  
25 opposition?



Colloquy

1 Is anyone making arguments specific to Lemonaid? I  
2 don't believe Lemonaid's name has come up during the entire  
3 hearing, so some clarification on that would be good.

4 We got clarification this morning about Regeneron as  
5 the backup bidder.

6 So those are the main questions about the scope of  
7 what's left. And perhaps if the states can clarify where they  
8 are on those issues, then maybe if you'd like to take a short  
9 recess before we get into argument, we can do that.

10 It's probably around that time anyway, Mr. Hopkins.

11 But perhaps the states can clarify for me what are  
12 the bases on which they're actively opposing the sale at this  
13 point?

14 MR. HOPKINS: Defer to Your Honor. I'm ready to go  
15 if you want me to -- if you'd like to hear argument, if you  
16 want to take a short recess to allow the states to confer and  
17 come back to Your Honor and answer that question.

18 THE COURT: Well, the states may be ready to clarify  
19 that now and then we could take a recess and then you could  
20 respond to that. And --

21 MR. HOPKINS: Of course.

22 THE COURT: But are you all ready to define the  
23 contours of your objection at this point, or do you need a  
24 little bit of time?

25 MS. MILLIGAN: I can give the Court a general

Colloquy

1 overview. I do want to take a moment and a break and just  
2 review to make sure that everything I'm saying is still  
3 accurate, but I believe our papers included objections  
4 generally under 363, 28 U.S.C. 959(b), the Texas Direct to  
5 Consumer Genetic Testing Act. And I can give you the specific  
6 state site if you need that.

7 THE COURT: No, I yeah, I know the statute, you mean.  
8 Okay.

9 MS. MILLIGAN: I don't think that we're moving on the  
10 other two statutes that we listed in our objection, which is  
11 the Texas -- I'm sorry, the TDSPA and ITEPA (ph.), I think,  
12 but just the DTC genetic act is --

13 THE COURT: Okay.

14 MS. MILLIGAN: -- what we're focusing our attention  
15 to, along with the just general 363(b) and -- or I'm sorry --  
16 363 in general and again, I will get kicked under the table if  
17 I've forgotten something, but --

18 THE COURT: No, just we'll take --

19 MS. MILLIGAN: I did want to take those off of the --

20 THE COURT: -- we'll take a short recess.

21 Alert Mr. Hopkins, as soon as you think of what it  
22 was that you just -- I understand we're in the middle of --  
23 this is real time. Nobody's trying to play games. So -- but  
24 this is helpful to me to just get my head around what we're  
25 dealing with.

Colloquy

1 Mr. Nadal?

2 MR. NADAL: Yes. The People of the State of  
3 California's objection is currently still standing as to the  
4 Genetic Information Practices Act.

5 THE COURT: GIPA, right. Okay.

6 MR. NADAL: Yes. Various arguments under 363 to  
7 address the legal positions they're making. And as well as 28  
8 U.S.C. 959.

9 THE COURT: 959. Okay.

10 MR. NADAL: We did not assert a common law argument.  
11 I believe we -- and we did have some CCPA arguments, but we're  
12 not continuing to press them.

13 THE COURT: Okay. Thank you. Appreciate the  
14 clarification.

15 Sir?

16 MR. CLEMENTS: Good afternoon, Your Honor. Marvin  
17 Clements for the State of Tennessee. We filed our limited  
18 objection -- excuse me, and our supplemental objection. And  
19 the main tenants that we're arguing under are whether this, in  
20 fact, equity transaction is a sale, such that it would be  
21 subject to 363. And then we have arguments as to how 363  
22 should be applied to the state's laws. And we have arguments  
23 about that there's not really an affiliate exception for  
24 consideration of whether it's a sale or not.

25 THE COURT: Under your state statute?

Colloquy

1 MR. CLEMENTS: Yes.

2 THE COURT: Okay. Okay. Thank you. I didn't mean  
3 to cut you short. That was --

4 MR. CLEMENTS: The only -- and just the issue of  
5 preemption in general with recent agreements.

6 THE COURT: Response to the debtor's preemption  
7 argument?

8 MR. CLEMENTS: Yes.

9 THE COURT: Okay. All right. Kentucky?

10 MR. HUNT: Yes, Your Honor. Thank you. Just to  
11 clarify, I'm here opening with this, but I guess I'll do it  
12 here and maybe save some time. Kentucky had joined in the  
13 United States' objection. That's Docket Entry 687. So we  
14 would just incorporate that. I don't mean to plow that ground  
15 again. And then we, like Tennessee, had filed a supplement.  
16 That's Docket Entry 792. And that references a specific  
17 Kentucky law. So my intention was to was to briefly cover  
18 that, and making some general arguments that incorporated the  
19 testimony and documents that had been placed in the record. I  
20 don't anticipate that taking terribly long.

21 THE COURT: Okay. Mr. Hunt, just to be clear, the  
22 NAAG objection filed earlier in this process has a number of  
23 other arguments, including the common law, if I recall  
24 correctly. So that's why I'm trying to figure out, of the --  
25 is there anything that you're relying on that's not in your

Colloquy

1 supplemental filings, Mr. Hunt?

2 MR. HUNT: No, we've joined that. And we would stand  
3 on that as just on the pleading. I don't intend to argue it.  
4 I hope that answers your question.

5 THE COURT: Okay.

6 MR. HUNT: I was going to address Kentucky statute in  
7 particular. But the other issues I was going to leave alone  
8 today and let you rule on the papers.

9 THE COURT: Okay. Very good. Thank you.

10 MR. HUNT: Does that answer your question?

11 MR. HOPKINS: Only because Mr. Hunt is remote, so I  
12 won't be able to speak to him in the hallway. If Mr. Hunt is  
13 not pressing his objection under Kentucky's genetic data  
14 privacy law, I can probably save Your Honor a minute or two of  
15 time to get to the argument.

16 THE COURT: I think he is pressing it, under the --

17 MR. HOPKINS: Okay.

18 THE COURT: --under the Kentucky statute.

19 Did I hear that correctly, Mr. Hunt?

20 MR. HOPKINS: I see him nodding his head, Your Honor.

21 THE COURT: Okay. Okay. Got it. All right.

22 And then do we have Utah? Is that our other --

23 MR. HUNT: Yes.

24 MR. NEDICK: Brett for Utah Attorney General's  
25 Office, for the State of Utah. And we will be pursuing the

Colloquy

1 same avenue as Kentucky, so --

2 THE COURT: States --

3 MR. NEDICK: We were originally part of the NAAG  
4 objection. We'll be resting on the papers for that and then  
5 arguing our state genetic information, perhaps. Yes.

6 THE COURT: Okay. Very good. And so I think those  
7 were the five states that were mentioned at the beginning of  
8 this morning's hearing, Texas, California, Tennessee,  
9 Kentucky, Utah. Is that right? Active opponents?

10 MR. HOPKINS: That's certainly --

11 THE COURT: Okay.

12 MR. HOPKINS: -- the debtor's understanding.

13 THE COURT: Okay. That's very helpful. Thank you  
14 all. Why don't we -- it's 5 after 3. Why don't we take a  
15 fifteen-minute recess, come back at 20 after for argument.

16 MR. HOPKINS: See you then, Your Honor. Thank you.

17 (Recess from 3:04 p.m. until 3:21 p.m.)

18 THE COURT OFFICER: Your Honor, we're back on the  
19 record.

20 THE COURT: Thank you. Please be seated, everyone.  
21 A couple folks still coming in? Okay.

22 Mr. Hopkins?

23 MR. HOPKINS: Good afternoon, Your Honor. Chris  
24 Hopkins of Paul, Weiss, counsel to the debtors. I think two  
25 potential housekeeping --

Colloquy

1 THE COURT: Yes.

2 MR. HOPKINS: -- items before we go into argument.

3 THE COURT: Housekeeping sounds great.

4 MR. HOPKINS: Counsel to the CPO would like to  
5 address the Court.

6 THE COURT: Sure.

7 MR. HOPKINS: And then I just wanted to give the  
8 states the opportunity to make any additional comments on the  
9 scope of argument, because I believe they were conferring  
10 during the recess.

11 THE COURT: Yes, of course. That's fine. Yes, sir.

12 MR. FIRSENBAUM: Thank you, Your Honor. On behalf of  
13 the CPO, with the evidence closed, and mindful of the debtor's  
14 resources, we were inclined to conserve resources and leave  
15 the proceedings for the day, with testimony over and evidence  
16 closed. However, since CPO is a pseudo officer of the Court,  
17 we did not want to be presumptuous and leave without asking  
18 Your Honor for the Court's preferences.

19 THE COURT: Sure. Thank you. That'd be fine. Yeah,  
20 that'd be fine.

21 MR. FIRSENBAUM: Okay.

22 THE COURT: Yes, I appreciate that. And have a good  
23 weekend.

24 MR. FIRSENBAUM: Thank you, Your Honor.

25 THE COURT: Ms. Ryan, please.

Colloquy

1 MS. RYAN: I just have one housekeeping matter. Yes.  
2 I did not forget about my exhibits. However, after listening  
3 to my friends here, I think the things that we would want in  
4 the record are in the record. And as far as -- we have  
5 consumer complaints as well. But it sounds like the debtors  
6 have conceded that, yes, states have been getting complaints.  
7 And so as opposed to arguing that, let's just go with states  
8 have been getting complaints. So --

9 THE COURT: That sounds fine.

10 MS. RYAN: I didn't want you to think I forgot about  
11 my evidence.

12 THE COURT: Okay. Thank you, Ms. Ryan.

13 MS. RYAN: Thank you.

14 THE COURT: All right. So then the states need to  
15 clarify the scope of what's at issue since the recess.

16 MS. MILLIGAN: Thank you, Your Honor. Layla Milligan  
17 for the State of Texas. We did file an objection and a  
18 supplemental objection. Just' to clarify, we're not seeking  
19 argument under the TDSPA (sic) and the ITAP, as mentioned  
20 earlier. There are some additional arguments as to  
21 jurisdiction and due process and things like that. But it's  
22 not beyond what's in our pleadings already, so we'll touch on  
23 that in our argument.

24 THE COURT: Okay.

25 MS. MILLIGAN: Thank you.



Colloquy

1 THE COURT: As long as it comes up today, I know I  
2 need to rule on it.

3 MS. MILLIGAN: Okay. Thank you.

4 UNIDENTIFIED SPEAKER: Just a minor clarification for  
5 Tennessee, I did not include a reference to the 959 that's in  
6 our brief, that we're still going to be --

7 THE COURT: Okay. You're running with 959 as well.  
8 Okay.

9 UNIDENTIFIED SPEAKER: -- we're going to rely on  
10 that, too.

11 THE COURT: Okay. Any other clarifications, counsel  
12 on Webex.

13 Okay. You know what you need to argue, Mr. Hopkins?

14 MR. HOPKINS: I'm sorry, Your Honor?

15 THE COURT: You know what you need to argue now?

16 MR. HOPKINS: If I don't know need to argue now, I'm  
17 in trouble.

18 THE COURT: All right. Please proceed.

19 MR. HOPKINS: All right. Thank you, Your Honor. So  
20 to be blunt, the Court can and should approve the sale. The  
21 objective states as -- the objecting states ask the Court to  
22 rewrite the Bankruptcy Code and require that any sale of PII,  
23 full stop, must comply with applicable nonbankruptcy law.  
24 Congress, not the states, get to make that call under the  
25 Code. They have done so, and they have rejected the states'

Colloquy

1 position. Congress specifically amended 363(b) to permit the  
2 sale of PII, unless the debtor's privacy policy, in effect on  
3 the petition date, prohibits the transfer of PII. Our policy  
4 as of the petition date, and all of our policies since the  
5 founding of the company, expressly permit the sale of PII in  
6 connection with the sale of the business. That's it.

7 If the Court finds that the debtors did not disclose  
8 the policy prohibiting the transfer of PII in connection with  
9 the sale on the petition date, which it clearly does not, then  
10 the Bankruptcy Code instructs that the objecting states'  
11 objections should be overruled, and the Court may approve the  
12 sale.

13 THE COURT: All right. A couple of questions on  
14 that, Mr. Hopkins. First of all, what do you contend makes up  
15 the debtor's privacy policy for purposes of 363(b)(1)? Is it  
16 the privacy notice? Is it the privacy notice plus the  
17 California specific page that counsel reviewed with several  
18 witnesses? Is it more than that? Is it less than that? What  
19 do you contend that I should be looking at for purposes of  
20 this question?

21 MR. HOPKINS: Our contention is that it is the terms  
22 of service, the privacy statement, and the supplemental  
23 privacy statements expressly incorporated into those documents  
24 which would include the state supplement, the GPDR that you  
25 heard from Mr. Lefkowitz. It is the four corners of the

Colloquy

1 documents that the debtors disclose to consumers that they  
2 must accept in order to receive the services from 23andMe.

3 We do not agree with Professor Richards. We do not  
4 agree with the states that you look outside and beyond those  
5 policies for terms of privacy policies. I don't think the  
6 debtors could, for example, disclose a privacy policy and then  
7 have a press release and then unilaterally change those terms  
8 of service, just by statements they make outside the four  
9 corners of the policies that the customers agreed to when they  
10 sign up for 23andMe services.

11 THE COURT: Okay. So your -- tell me if you agree  
12 with this characterization. The debtor's view of the privacy  
13 policy is more like how a lawyer would view it, as opposed to  
14 Professor Richards, who's more like how a student of  
15 behavioral economics might view it. Maybe I got the wrong  
16 discipline there, but you get the idea.

17 MR. HOPKINS: I understand your question, Your Honor.  
18 I think we would say we interpret the policies consistent with  
19 the law as to how privacy policies are interpreted in courts  
20 around the country, which is not, what did they say in a  
21 marketing campaign? What did they say in a blog post? It's  
22 what did they disclose to the customers as being the binding  
23 terms of service and privacy policy that the customers consent  
24 to when they sign up for the services of 23andMe.

25 THE COURT: Okay. And then in the preemption



Colloquy

1 argument, just I want to make sure I understand the scope of  
2 preemption argument. First of all, this is limited to PII,  
3 right? For example, the debtors can't sell a kilo of cocaine,  
4 because that's illegal under federal law, right?

5 MR. HOPKINS: That's right, Your Honor. I -- a  
6 couple points on this. We think this is clear conflict  
7 preemption. We think Congress looked at -- I mean, I think  
8 the -- to parrot Mr. Richards -- or Professor Richards,  
9 rather -- I think the academic literature has broad consensus  
10 that BAPCPA amendments to 363(b) came out of the Toysmart  
11 case, and the concerns that the FTC raised about what happens  
12 to sales of PII in bankruptcy.

13 We think Congress looked at two things. They looked  
14 at bankruptcy policy. And I think Your Honor knows as well as  
15 anyone what the key tenets of bankruptcy policy are,  
16 maximizing value for the benefit of stakeholders and  
17 preserving business as a going concern. Congress put that on  
18 one side of the scale. On the other side of the scale, they  
19 thought about, well, what about consumer privacy with respect  
20 to sales involving the transfer of PII? And they made a  
21 decision, and they expressly contemplated applicable  
22 nonbankruptcy law in making that decision. And that's clear  
23 from the text and structure of the statute, which the Supreme  
24 Court instructs us is what we look to to determine issues of  
25 conflict preemption.

Colloquy

1           And Congress made a choice. They balanced the  
2     competing policies to the extent they're competing, which I  
3     would argue on the terms of this sale, they're really not.  
4     And Congress said a debtor can sell PII in furtherance of  
5     those bankruptcy policies in one of three ways. One, they  
6     have not disclosed a policy to consumers, in effect as of the  
7     petition date, that prohibits the sale of PII.

8           THE COURT: So that if the debtor doesn't have a  
9     policy at all, does the preemption apply or not?

10          MR. HOPKINS: I think it does, Your Honor.

11          THE COURT: Okay.

12          MR. HOPKINS: Then. 363(b)(1)(A) says we -- our  
13     position is that even if the policy may restrict or prohibit  
14     the transfer of PII, the Court can approve the sale, as long  
15     as it's consistent with the policy. And I think that would  
16     involve a situation like Toysmart, where maybe the debtor does  
17     have policy that, on its face, says we will not transfer your  
18     PII. But you structure a sale like we've done with TTAM,  
19     where it's a sale of the entire business, not just the PII.  
20     Maybe the buyer is willing to provide privacy enhancements, as  
21     TTAM is doing here.

22                 The Court can either conclude that there's no policy  
23     prohibiting the transfer. They can conclude that to the  
24     extent there is a policy, it's still consistent with the  
25     policy, and the Court can approve the transfer. And Congress

Colloquy

1 has preempted state law under conflict preemption in the  
2 narrow circumstance of a 363 sale involving PII. Or neither  
3 of those two statutory predicates are met, and then, and only  
4 then does Congress think applicable nonbankruptcy law comes  
5 into the picture.

6 And I think you heard testimony from Professor Cate  
7 today. He's not aware of a case where a court has ruled that  
8 there's a policy that -- where a court has gotten to, does  
9 state law prohibit a transfer that the Code otherwise permits?  
10 And we would submit that's because those cases are going to be  
11 few and far between because of the structure of the statute.

12 Congress has decided that, in furtherance of  
13 bankruptcy policy, even if there was a state statute that  
14 placed a restriction on the ability to sell PII, that as long  
15 as the debtors have not disclosed the policy prohibiting the  
16 sale, or the sale is not otherwise consistent with that  
17 policy, then the Court looks to state law to fill the gap.

18 THE COURT: So I asked Professor Cate. I'm going to  
19 ask you, too. You can't cite to me a case where a judge has  
20 done what you're asking me to do here.

21 MR. HOPKINS: Not with respect to the sale of PII in  
22 bankruptcy. We have not found a case. But I do think there  
23 are -- there is Eighth Circuit precedent that we could point  
24 to that we think is instructive, in terms of how the Eighth  
25 Circuit has interpreted preemption and how it should be

Colloquy

1 applied here under 363(b) of the Code.

2 THE COURT: Okay. Let me make sure I understand the  
3 implications of your argument. If a debtor has a privacy  
4 policy that allows all-asset sales, are there any  
5 nonbankruptcy restrictions on that sale that the Court must  
6 enforce?

7 MR. HOPKINS: On any assets, Your Honor?

8 THE COURT: On PII. Sorry, PII.

9 MR. HOPKINS: Just on PII.

10 THE COURT: On, PII. Yeah.

11 MR. HOPKINS: So the -- your hypothetical, the  
12 debtors have a policy that just says we can we can freely  
13 transfer your PII to --

14 THE COURT: Well, the policy says we freely transfer  
15 any asset. But in the context of PII, are there any state law  
16 or nonbankruptcy law restrictions that would then apply?

17 MR. HOPKINS: I don't think there are any transfer  
18 restrictions on the debtor on the debtor's transfer of PII  
19 under 363(b)(1). I think that to the extent that that policy,  
20 in and of itself, violates applicable nonbankruptcy law, once  
21 the data is in the hands of the buyer, if the policy has  
22 traveled with the data, the regulators are free to pursue  
23 whatever claim or cause of action they wish against the buyer,  
24 once it's in the hands of the buyer. But I think Congress has  
25 said that if your policy doesn't prohibit it in furtherance of

Colloquy

1 the bankruptcy goals of value maximization and preserving  
2 going concerns, that we will allow the sale of PII.

3 THE COURT: Okay. So what if the debtors here said,  
4 we want to sell our collection of PII, including genetic data,  
5 to Vladimir Putin's brother? Applicable nonbankruptcy law, I  
6 assume he's on a sanctions list somewhere. Maybe it's Putin.  
7 Somebody's on a sanctions list.

8 MR. HOPKINS: I think that's right, Your Honor.

9 THE COURT: Right. Under your theory, wouldn't the  
10 Bankruptcy Code preempt the trade sanctions and OFAC review  
11 and all that sort of thing?

12 MR. HOPKINS: I think 363(b), by the structure, gives  
13 protections around issues that apply in all 363(b) sales.  
14 Sound business purpose, good faith purchaser, fair purchase,  
15 like all of the things that we would have to come in and show  
16 to your court. So if we came in and told you, Your Honor --  
17 to stick with your example -- we want to take all of our  
18 customers' data. We want to -- and because our policies  
19 permit it, we're going to sell it to Vladimir Putin. He's  
20 going to tear it up and do whatever he wants with the data. I  
21 don't think that that -- I mean, I would argue to Your Honor,  
22 that you could tell me that's not a sound exercise of your  
23 business judgment.

24 THE COURT: I probably would, but the question is  
25 whether -- well, let me give you another one. Let's say the



Colloquy

1 debtors want to sell to a company that's majority controlled  
2 by a foreign person, and it would otherwise trigger review by  
3 the Committee on Foreign Investment in the United States. The  
4 U.S. filed a brief or filed a warning in this case about this  
5 very issue.

6 MR. HOPKINS: Well, I think with respect to federal  
7 statutes, like HRS, CFIUS, like, we don't dispute CFIUS and  
8 HSR apply. But I think there's express language in the sale  
9 order that says that it does. I think the preemption is  
10 derived from the Supremacy Clause. So it's -- it is to the  
11 extent that a state is putting a transfer restriction on the  
12 sale of PII, where Congress has said the relevant standard is  
13 just, what is the policy on the effective date? I think  
14 that's the limited scope of preemption that that we're arguing  
15 is clear from the text of the statute and congressional  
16 intent.

17 Because they clearly thought about nonbankruptcy law.  
18 It's in the text of the statute, and it's very prescriptive  
19 about the waterfall of provisions you get to before a sale of  
20 PII requires a finding that no showing was made that the sale  
21 violates applicable nonbankruptcy law.

22 THE COURT: Sure, but it doesn't say state law. How  
23 do we cabin this to only state laws that pose an obstacle to  
24 completion of a sale, as opposed to CFIUS or something like  
25 that?

Colloquy

1 MR. HOPKINS: Well, I don't believe that the concept  
2 of preemption under the Supremacy Clause would apply to a  
3 competing federal statute where Congress, who has exclusive  
4 jurisdiction over the bankruptcy process, may also have  
5 exclusive jurisdiction or another federal statutory regime  
6 that may apply to limit the sale, like HSR or CFIUS.

7 THE COURT: Okay. Okay. Go ahead. Sorry.

8 MR. HOPKINS: No, no problem, Your Honor. Questions  
9 are more than welcome. So I think we've kind of -- we've  
10 walked through, obviously, our view of how the Court should  
11 apply 363(b)(1) in the context of the sale. And our position,  
12 as we just discussed, is that under clear principles of  
13 conflict preemption, Your Honor can approve the sale, because  
14 it's consistent with our policy.

15 But even if the Court wants to wade into the waters  
16 of state law, our position is no showing has been made that  
17 the proposed equity sale violates state law. And I think the  
18 text of the Code that no showing was made places the onus not  
19 on the debtors to prove that it does comply with applicable  
20 nonbankruptcy law. I think the onus is on the objecting  
21 parties as a matter of who bears the burden of proof.

22 And our position is the objecting states can never  
23 make that showing, given the structure of the equity sale and  
24 the terms that TTAM has agreed to for the transaction we're  
25 seeking approval of today. And I know Your Honor is probably

Colloquy

1 well aware, because we went through it in some detail on  
2 Wednesday, but just to kind of reset the table for the  
3 purposes of the argument.

4 The equity sale structure involves two pieces. There  
5 is a traditional 363 sale from the debtors to HoldCo or to  
6 NewCo. NewCo will be a wholly-owned subsidiary controlled by  
7 the debtors, walled off from any third-party that doesn't have  
8 access to the company or the company's information as of  
9 today. That's step one. Step two is the debtor HoldCo that  
10 owns the equity of NewCo will be selling the equity of NewCo  
11 and only the equity of NewCo to TTAM.

12 I want to take those -- and just in brief summary,  
13 and then I'm happy to jump around in the argument to wherever  
14 Your Honor wants to focus, but just at a high level as to why  
15 we think this complies with all the state laws you're going to  
16 hear about from the objecting states. And I want to start  
17 with the sale of the -- actually the second step, the sale of  
18 the NewCo stock, because I think that's the easiest. The  
19 debtor's sale of stock of a wholly-owned subsidiary to TTAM is  
20 not a transfer or disclosure to a third-party or person of --  
21 and this is the key term -- genetic data by a direct-to-  
22 consumer genetics testing company.

23 In that sale, no genetic data is moving anywhere.  
24 And we've talked to Your Honor about that before. Same  
25 officers, directors, and employees, same management team, same

Colloquy

1 servers, same laboratories, same policies as enhanced by the  
2 TTAM proposal. Nothing is changing. It is strictly a sale of  
3 equity. No objecting state statute prohibits changes in  
4 ownership of a direct-to-consumer genetic testing company.

5 And just to save us some time, Your Honor, if it's  
6 all right with you, "direct-to-consumer genetics testing  
7 company" is a term of art under these statutes. I -- to be  
8 brief, I'll just refer to it as a "DTC company," if that's  
9 okay with you. None of those statutes regulates a change of  
10 ownership in DTC company effectuated through a stock sale.  
11 And the NAAG states seem to acknowledge that in their papers.

12 I don't want to put words in their mouth. But they  
13 said, what we're doing on the asset sale, that violates all of  
14 our laws. There is a legal way to do it. You could sell the  
15 debtor's stock. We don't think that's necessary. We think  
16 that's a bit form over substance. But we can structure this  
17 as an equity sale. That's what we're doing. And if, based on  
18 the text of their statutes, they think that type of transfer  
19 works, we're happy to accommodate, and TTAM agreed to  
20 accommodate.

21 The debtor's sale of the acquired -- now we're -- now  
22 on to step one in the structure, the sale to NewCo. The  
23 acquired assets, which are the same acquired assets that have  
24 been in the in the TTAM APA since May 19th, when it was filed  
25 on the docket, obviously includes the PII. So that's where

Colloquy

1 the states are going to argue, and they have to argue, and  
2 it's the only component of the sale in which we submit they  
3 can argue that genetic data is being moved anywhere.

4 That is also not a transfer or disclosure to a third-  
5 party or other person. That would require affirmative opt-in  
6 consent from the objecting states to effectuate that sale.  
7 The sale of the debtor's assets, including PII to NewCo, which  
8 again is an entity that will be wholly-owned and controlled  
9 affiliate of the debtors, is merely an intercompany ownership  
10 change. We already talked about how everything will  
11 effectively stay the same, in terms of who has access to the  
12 data, how it's processed, managed and used, everything.

13 It is a sale to affiliate -- to an affiliate of a DTC  
14 genetic testing company that is part of the DTC company,  
15 something most states' comprehensive privacy laws -- which  
16 there's a distinction between -- I believe all of the  
17 objecting states have comprehensive privacy laws, in addition  
18 to their CHIPA laws, although I believe Kentucky's may have  
19 been approved, but it's not technically in effect until  
20 January. So I just want to be clear with Your Honor.

21 All of those more comprehensive regulatory regimes  
22 expressly exclude, from the scope of those laws, transfers to  
23 affiliates. Every state except California does it expressly  
24 in the statutory language. It says a sale to an affiliate is  
25 carved out of whatever transfer restrictions the law may

Colloquy

1 apply. California doesn't include that express prohibition.  
2 But we would submit that's easy, Your Honor, because all --  
3 the other four objecting states besides California, their  
4 statute speaks to restrictions on a transfer or disclosure to  
5 a person, and depending on the statute, which we'll get to  
6 later on, that has various meaning. Some states don't define  
7 it. Some states do define it.

8 "Third party" under California law is not defined.  
9 And in the context of what does it mean for a party to make a  
10 showing that a proposed sale of PII does not comply with  
11 applicable bankruptcy law?, we believe it's California's  
12 burden to establish that "third party" means "affiliate." And  
13 we think it is very clear under the law. And we cite a case  
14 in our papers. And I can cite a case to Your Honor today that  
15 uniformly -- and this is from a decision from Judge Marvin  
16 Isgur recently in the Southern District of Texas. He says, in  
17 the context of a dispute arising in a liability-management  
18 transaction, that, of course, in the legal context, "third  
19 party" does not mean an "affiliate."

20 And so it's logical that because California uses  
21 "third party," whereas all the other statutes just say  
22 "person," that you don't need a carve-out for sales to an  
23 affiliate in California's comprehensive data privacy law,  
24 because "third-party" does not include "affiliates."

25 And so on these facts, the sale to NewCo is not a

Colloquy

1 transfer or disclosure to a third party or person under any  
2 conceivable reading of the objecting states' laws. And we  
3 would submit that even if Your Honor feels compelled to look  
4 to 363(b)(1)(B) that you can still approve the sale. There's  
5 two prongs under that piece of the statute, one based on the  
6 facts, circumstances, et cetera and after a CPO report has  
7 been submitted.

8 I think the facts and circumstances of this case  
9 weigh heavily in favor of the sale. My colleague from the  
10 from the creditors committee made a -- I believe, a tongue-in-  
11 cheek comment yesterday that this is a perfect sale. But you  
12 heard in testimony from Professor Cate -- who he is an expert  
13 on privacy, in our view -- that this -- in many ways, this is  
14 the perfect sale, and we agree.

15 And then as I -- and I'm happy to -- we have a  
16 demonstrative, Your Honor, if you -- we're prepared to go kind  
17 of statute by statute and unpack the arguments for the Court  
18 as to why we do not believe that even if state law applied --  
19 which it doesn't and -- both just on the plain reading of  
20 363(b)(1)(A), (b)(1) and (b)(1)(A), and the principles of  
21 conflict preemption, if Your Honor wants to get in -- rule on  
22 whether the sale complies with applicable nonbankruptcy law,  
23 we're prepared to do that and go through those statutes.

24 THE COURT: Okay. Well, I'm not sure if I'm going to  
25 go in that direction or not. So probably want to take that

Colloquy

1 opportunity to walk me through it. Okay.

2 MR. HOPKINS: Your Honor, I can either go straight  
3 there, or, I mean, as the debtors, there are other elements of  
4 363(b). They're not really in dispute, so I'm happy to spend  
5 as much or as little time. But these are things like sound  
6 business purpose, highest and best. To the extent the Court  
7 concludes that heightened scrutiny applies to the sale, we can  
8 walk through the arguments on that, or we can we can jump to  
9 what I think is really the heart of today.

10 THE COURT: I think those are all in your brief and  
11 covered pretty well, right?

12 MR. HOPKINS: We believe so, Your Honor.

13 THE COURT: Okay. If there's any --

14 MR. HOPKINS: If you'd like -- if you have any  
15 questions -- I do think, actually -- if it's all right with  
16 Your Honor, because I believe Ms. Milligan mentioned due  
17 process, so it may be worth spending a minute --

18 THE COURT: Sure.

19 MR. HOPKINS: -- on notice --

20 THE COURT: Sure.

21 MR. HOPKINS: -- if that's all right with Your Honor.

22 THE COURT: Sure.

23 MR. HOPKINS: The notion raised by the objecting  
24 states that we are proceeding without adequate and reasonable  
25 notice here, I think, just really and respectfully just



Colloquy

1 ignores the facts of the case. The objecting states have  
2 known, since before the petition date, that the business was  
3 up for sale. They, in the special committee, as early as  
4 January 28th, had issued a press release that said the company  
5 is exploring strategic options, including a sale. There was  
6 obviously an extraordinary amount of media attention around  
7 the company. There continues to be an extraordinary amount of  
8 media attention around the company today.

9 And even after the cases were commenced, I think  
10 we've heard argument from the objecting states that they  
11 didn't know that PII was going to be sold. I think that  
12 there's a couple reasons why I think that doesn't hold water.  
13 One, many state AGs felt compelled to issue press releases  
14 encouraging our customers, both before and after the petition  
15 date, to delete their data, to the detriment of the debtor's  
16 estates. So if they didn't think the data was going to be  
17 sold, what's the purpose of those press releases?

18 They also -- we filed on the first day of the case,  
19 and Your Honor approved, at the first-day hearing, bidding  
20 procedures that explicitly said, we're going to be selling  
21 all -- all or substantially all of our assets are going to be  
22 marketed. So to the extent that the states take issue with  
23 the debtor's ability to sell PII under the Code,  
24 notwithstanding what their state laws say, they've really been  
25 on notice of that since the end of March.

Colloquy

1           On May 14th, we completed service of the bar date  
2   notice and a notice of commencement to all customers at  
3   significant expense to the estate. I won't keep reiterating  
4   that point, because obviously due process and notice are  
5   important to the debtors. But every time you hear me say  
6   "notice to all customers," that's millions of dollars in  
7   expense, to ensure that the debtors did the right thing, and  
8   that the customers had every opportunity to make an informed  
9   decision about what to do with their data.

10           On May 14th -- I'm sorry -- on May 19th, we filed and  
11   served the notice of successful bidder and backup bidder.  
12   That was TTAM and Regeneron. Those APAs lay out defined  
13   terms. What's the -- what are the acquired assets? What are  
14   the assumed liabilities? What's staying behind in the estate?  
15   And I would note for the record, Your Honor, because certain  
16   of the states have made comments that the equity sale is a  
17   gotcha, or it's a material sea change in how this transaction  
18   is being structured and effectuated.

19           One, I would make the point that the perimeter of  
20   what are the acquired assets and assumed liabilities has not  
21   changed. So in terms of what we are seeking to sell to the  
22   buyer in the 363 process has been on the record for over a  
23   month. And with respect to the TTAM APA, section 2.8 of the  
24   TTAM APA that was filed on May 19th, expressly contemplate the  
25   possibility that the transaction could be effectuated as an

Colloquy

1 equity sale or through a plan toggle.

2 Now, admittedly, Your Honor, it was not as in the  
3 fully flushed out form that was in the APA's that were later  
4 filed after the final proposal procedures. But anyone who  
5 read the APA would have known that, based on our negotiations  
6 with TTAM, that type of flexibility was based in that  
7 transaction.

8 THE COURT: Give me that section number again,  
9 please.

10 MR. HOPKINS: 2.8.

11 THE COURT: 2.8. Thank you.

12 MR. HOPKINS: Between June 11th and June 16th, we  
13 sent a subsequent notice of all of the sale to all of our  
14 customers, advising them of the potential sale of their data  
15 to either TTAM or Regeneron. We didn't know at that time when  
16 we had to start that process, because the final proposal  
17 procedures hadn't happened. Nothing in the bidding procedures  
18 required us to do that. We don't believe that anything under  
19 the rules required us to do that. We did that because we felt  
20 it was the right thing to do, to provide people notice,  
21 because of the company's historical commitments to customer  
22 privacy.

23 On June 13th, we filed and served the notice of  
24 winning bidder, disclosing TTAM as the winning bidder. And  
25 that APA has the full-fledged equity toggle and plan toggle

Colloquy

1 provisions that are in the APA we're seeking approval of  
2 today. Again, those were not new concepts. And those APA  
3 provisions were filed on June 13th. The states' objections  
4 came in on June 9th and June 10th. We didn't know NAAG's  
5 position on how equity sales were viewed under their laws,  
6 really, until we saw it in writing on a pleading filed three  
7 days before.

8           So the debtors and TTAM reacted to what we saw to  
9 maximize the likelihood of, one, we get the sale approved  
10 today, and two, we could resolve as many objections as  
11 possible with the states. On June 14th, because it was an  
12 equity-sale toggle, we filed a notice informing all parties in  
13 interest that we were exercising our rights to implement the  
14 transaction through that toggle.

15           And so I think I went longer than a minute. But the  
16 notion that the debtors have sandbagged this process or  
17 provided insufficient notice I think on this record, false  
18 flag. So turning to some of the other provisions of -- I  
19 think with that, Your Honor, unless you have questions  
20 about -- I think the only other point I would like to address  
21 briefly, before we turn to the state law arguments, is 363(f).  
22 And this is, in large part, due to Texas' arguments that there  
23 is some due process issue here, or that we are somehow  
24 violating Texans' property rights with respect to their data,  
25 or using the Bankruptcy Code to improperly strip a property

Colloquy

1 interest from a customer.

2 Under the equity sale, it's true, like in -- the  
3 NewCo sale is -- and the equity sale are both free and clear  
4 relief under 363(f). Regular-way monetary claims, Your Honor,  
5 I mean, those are those are -- like unsecured claims, those  
6 are going to remain behind in the states. I think we talked  
7 about it with Your Honor at the prior hearing. There is  
8 language in the sale order that says whatever the debtor's  
9 rights, as among each other, or their respective creditors and  
10 stakeholders to the sale proceeds, those are preserved, as  
11 of -- if we had done it the way of an asset sale, and there  
12 were -- there was no NewCo sale, and there was no sale to TTAM  
13 of NewCo's equity, those are preserved. So no, I don't -- as  
14 a substantive matter of who has a legal entitlement to the  
15 proceeds of the sale, that's all being kept exactly as it  
16 exists today.

17 For customers specifically, I think there's two  
18 lenses to look at this. If you are a creditor of the company,  
19 prior to the closing date, that monetary claim -- so if you're  
20 a cyber-breach claimant, for example, the monetary claim stays  
21 behind in the estate. We think that's appropriate under  
22 363(f)(5). They have a right to money. They're going to be  
23 able to assert that right to money against the sale proceeds.  
24 All their legal entitlements are preserved.

25 With respect to customers' rights as to their data,



Colloquy

1 whether that's under our privacy policies or under Texas law,  
2 that is not subject to 363(f). And I think there's language  
3 in the sale order, or the updated version of the sale order,  
4 that's very clear about that. Monetary claims stay behind.  
5 All other rights ride through. So their rights -- customers'  
6 rights under Texas law, customers' rights under the privacy  
7 policies, that's not being affected or taken away. In fact,  
8 it's being enhanced by what TTAM is agreeing to under their  
9 APA.

10 So I wanted to address that, to try to give Ms.  
11 Milligan and the State of Texas some comfort, that nothing  
12 that's happening here is abrogating those rights. Whatever  
13 interest in the data we have, that's all we're selling to  
14 TTAM, no more, no less. We're not taking anything away from  
15 the customers in effectuating the sale to TTAM.

16 With that, Your Honor, I mean, I think we've already  
17 covered the statutory arguments, and we've discussed  
18 preemption with Your Honor. Unless you have any questions on  
19 any of the other topics for me, I think we can dive into state  
20 law.

21 THE COURT: I think, yeah, I'm comfortable with the  
22 briefing on the -- what I'll call the basic 363 issues that we  
23 would see in any case. So I think focusing on the State  
24 statutes is probably a good next step.

25 MR. HOPKINS: Sure. We do have some slides --

Colloquy

1 THE COURT: Sure.

2 MR. HOPKINS: -- to help walk through this.

3 Because -- and I would ask for Your Honor's indulgence in  
4 advance, because these are somewhat dense statutes. And so I  
5 think --

6 THE COURT: Yeah. I've got --

7 MR. HOPKINS: -- we need to be thorough in how we  
8 kind of parse them.

9 THE COURT: I think I've got copies of them here,  
10 too. We'll see if we're looking at the same statutes.

11 MR. HOPKINS: Can we go to slide 15, please?

12 So I think we heard from the states that other than  
13 our -- in terms of what state-law arguments are we going to  
14 hear today, it sounds like all five of the objecting states  
15 are going to rely on their GIPA statutes. And this is  
16 somewhat of a summary, although it's pretty close, because  
17 there's slight variations, as we said, across the statutes.

18 So what needs to exist for GIPA to apply? One, needs  
19 to involve a direct-to-consumer genetic testing company.  
20 That's a defined term under the statutes. It needs to involve  
21 a transfer or disclosure of genetic information to any person,  
22 for all the four states, except California, and for  
23 California, it's to a third party. And if those conditions  
24 are satisfied, the state laws require separate express  
25 consent. And I'm a restructuring lawyer, not a privacy

Colloquy

1 lawyer. I read that as effectively affirmative opt-in  
2 consent. That's how I think about that under these privacy  
3 laws.

4 Next slide, please.

5 So I think we already covered this, Your Honor, in  
6 the intro, so I'll be brief, unless Your Honor has questions.  
7 With respect to step two of the equity sale, which is the sale  
8 by debtor HoldCo to TTAM of the NewCo equity, there is no  
9 genetic data that is actually being sold. The genetic data  
10 stays in NewCo, all the things we talked about remaining the  
11 same. It is simply a sale of an equity interest in a wholly-  
12 owned sub. And that equity interest is indisputably an asset  
13 of the estate that can be transferred pursuant to 363(b), and  
14 we don't think GIPA even applies.

15 Next slide, please. And I wanted to cover this off,  
16 because I think it's a similar point. All of these laws refer  
17 to transfer or disclosure. And so how does Your Honor get  
18 comfortable that there's no disclosure under any of these  
19 statutes? And we can just focus on the issue of whether there  
20 is a transfer. As supported by the testimony Your Honor has  
21 heard Wednesday and today, there really isn't a disclosure of  
22 new genetic -- of genetic information happening to anyone.  
23 Same management team, same employees. Data stays on existing  
24 servers and in the existing labs. Same privacy policies  
25 enhanced by the TTAM privacy protections. And there will be



Colloquy

1 no new use, maintenance, collection, or processing of customer  
2 data that's not contemplated and permitted by the privacy  
3 policies today.

4 So we think, as we go through these statutes, we're  
5 just going to focus on transfer, because we think the record  
6 is clear that there's no conceivable disclosure on which the  
7 states can rely.

8 Next slide, please.

9 MR. HOPKINS: So we've dealt with the step two, the  
10 equity-sale component. So from here on out, we're really --  
11 we're focused on the NewCo sale. We think the NewCo sale is a  
12 transfer within, not from, the genetic-testing company. And  
13 as I said, direct-to-consumer genetic-testing companies has a  
14 specific meaning under the statutes. And that is an "entity."  
15 And that's an important word, although it's undefined under  
16 the statutes. But I'll explain why in a moment. That offers  
17 genetic testing services directly to a consumer, or the second  
18 prong, collects, uses, or analyzes genetic data from a DTC  
19 genetic testing product or service.

20 And while the GIPA laws do not define the term  
21 "entity," we submit that in order for that term to be  
22 interpreted consistently throughout the structure of the GIPA  
23 statutes, that term has to be read to encompass the entire  
24 corporate family that operates the business. I think the  
25 states would have Your Honor take a myopic view and say,

Colloquy

1 whatever the legal boxes in an organizational structure that  
2 does one particular type of thing, whether it's genetic  
3 testing -- or we'll get to it in a second -- insurance-related  
4 businesses, that it just means the legal entity that actually  
5 does the thing. It doesn't mean any ancillary entities that  
6 may be wholly-owned and controlled affiliates that are related  
7 to and contribute to the main entity's ability to provide the  
8 service. And so let me tell you why I think the statute has  
9 to operate that way.

10 Next slide, please.

11 All of these GIPA statutes, in addition to  
12 restricting what kind of disclosures and transfers a DTC  
13 genetic testing company can make, they also place significant  
14 restrictions, understandably so, on the ability to transfer  
15 genetic data to any entity that is responsible for  
16 administering or making decisions regarding various forms of  
17 insurance-related businesses. And the position the states  
18 want you to take on what an entity means with respect to  
19 23andMe breaks the statute, with respect to the protections  
20 that the legislatures were trying to give customers, in the  
21 context of a transfer to an entity involved in health  
22 insurance, life insurance, long-term -- this list of things on  
23 the screen.

24 And why do I say that? If I was a large national  
25 health insurance company, and the Court agrees with any of the

Colloquy

1 objecting states' interpretation of what does an entity mean  
2 under GIPA, I would say, aha, all I have to do is form a new  
3 wholly-owned subsidiary, wall it off from my insurance  
4 business, and I can I can get genetic data free and clear of  
5 the protections that GIPA would otherwise -- the protections  
6 and the restrictions that GIPA would otherwise require if --  
7 for me to receive genetic data. That cannot be what  
8 California or any of the other objecting states legislatures  
9 intended. We think you have to read terms across the statute  
10 consistently. We think "entity" means "the business", which  
11 is multiple legal entities that do the same thing or are under  
12 common ownership and control. And therefore, the NewCo sale  
13 is not a transfer from a DTC genetic testing company. It is a  
14 transfer within a DTC genetic testing company. And Your Honor  
15 need not even consider whether it's a transfer to a third-  
16 party or a person.

17 The next slide, please.

18 And this is a point I made -- this is also a point I  
19 made earlier, but I wanted to show Your Honor the actual text  
20 of the statutes in the objecting states. What's referenced  
21 here on this slide is each objecting states' comprehensive  
22 privacy law. So GIPA is more specific. GIPA applies to  
23 genetic information. These laws are similar in purpose,  
24 protecting consumers' privacy. Each of them, with the  
25 exception of California, which I'll clarify in a second,

Colloquy

1 carves out a sale of personal information to an affiliate.

2 Step one of our transaction is a sale of personal  
3 information to an affiliate. I think I mentioned it to Your  
4 Honor. Why is California different? Well, California doesn't  
5 have a carve-out for transfer to affiliate, but that's because  
6 California doesn't restrict transfers to a person. It  
7 restricts transfers to a third party.

8 And under the law, third party is consistently read,  
9 and we cite case law in our brief, for the proposition that,  
10 well, of course an affiliate is not a third party. They're  
11 under common control. And that also reinforces the argument  
12 we just made to Your Honor about how the NewCo sale is a  
13 transfer within a DTC genetic testing company that doesn't  
14 even get you to the transfer restrictions under state law.

15 Next slide, please.

16 NewCo is not a person or a third-party. And here's  
17 the case law I promised Your Honor. In re: Wesco Aircraft.  
18 The cite, for the record, it's 2025 WL 354858 at 21. And as I  
19 said, that's a decision from Judge Marvin Isgur. Bankruptcy  
20 Court of the Southern District of Texas. And that's a very  
21 recent decision, Your Honor. That's from January of 2025.  
22 And quoting, "In common legal writings, the term third party  
23 is uniformly used in a manner that excludes affiliates."

24 And again, I would reiterate to Your Honor that what  
25 363(b)(1)(B) says is no showing was made that the transaction

Colloquy

1 violates applicable nonbankruptcy law. And here, it's  
2 California's burden to convince you that in light of actual  
3 authority and case law that third party doesn't mean  
4 affiliate.

5 The remaining statutes of the objecting states refer  
6 to person. And just to walk through it, those objecting  
7 states either do not define the term. I think that's only  
8 Utah. Or others define it by reference to specific enumerated  
9 entities. And so I think it's worth going through that  
10 analysis with the Court.

11 Next slide, please.

12 I want to start with Texas. And I want to preface  
13 this argument, Your Honor, by making a point. The AGs asked  
14 this Court to engage in a hyper-technical analysis of state  
15 law that is really, in many ways, divorced from the actual  
16 policy, these statutes, or what they can be reasonably assumed  
17 to have been the legislative intent, in terms of the type of  
18 transfers and disclosures the legislature is intended to  
19 prevent. We think the approach is myopic. And I think a good  
20 example is what I walked Your Honor through in terms of how  
21 they want to read "entity" in different ways based on where it  
22 appears in the statute, which is not something that typically  
23 is recommended by courts when interpreting statutes. They  
24 require that terms be applied consistently.

25 And so I think it's worth applying Texas' statutory

Colloquy

1 interpretation to their definition of person. And it's laid  
2 out on the slide. It's a very specific definition. It  
3 includes certain types of legal entities. And those types of  
4 legal entities are also clearly defined elsewhere under Texas  
5 law.

6 So what is a person under GIPA? An individual,  
7 partnership, corporation, association, business, business  
8 trust, or the legal representative of an organization. One  
9 thing that's not in that list, Your Honor, is a limited  
10 liability company.

11 How does Texas law define a limited liability  
12 company? Under the Corporations Act, an LLC is not a  
13 corporation or a partnership. It's not an individual. It's  
14 not an association. TTAM -- or I'm sorry, not TTAM. NewCo  
15 will not own or operate anything at the time of the transfer.

16 And so if Texas tells us, don't look to what a  
17 reasonable purpose in enacting the statute is. Let's just  
18 apply the text in a myopic and robotic way. Well, then, with  
19 respect to the NewCo sale, NewCo is not a person. It's not  
20 subject to GIPA. And that's the type of absurd result that we  
21 think our interpretation of these statutes intends to avoid.  
22 But under Texas law, on a strict construction of the statute,  
23 we don't even think NewCo is a person to whom a transfer would  
24 be prohibited under GIPA.

25 On the next slide, on the remainder of the statutes,

Colloquy

1 Utah's is undefined. We will stipulate that the Kentucky and  
2 Tennessee statutes do include LLC. But again, Your Honor, I  
3 think this gets to kind of the fundamental canon of statutory  
4 interpretation that a statute should not be construed to  
5 create an absurd result.

6 And so if the objecting states are right, I think  
7 it's worth talking about what some of the results of their  
8 interpretation would be. And let's use 23andMe as an example.  
9 Let's assume we never filed for bankruptcy. We're a regular,  
10 healthy operating company. We have thirteen million  
11 customers.

12 Under their reading of the statute, if it was  
13 beneficial for our shareholders to do an internal  
14 reorganization for tax purposes, we need millions of customers  
15 in the objecting states to consent. If Mr. Lefkowitz decides  
16 to go and enjoy early retirement and we need to replace the  
17 chief privacy officer, who in his role assists the customer  
18 care team who has access to PII of our customers, we can't do  
19 that. We can't go hire a new chief privacy officer because  
20 he's an individual -- he or she is an individual without going  
21 and getting thirteen million customers' affirmative consent.  
22 We can't hire or replace our customer care employees. We  
23 couldn't elect a member of the board in accordance with good  
24 corporate governance.

25 And so we think even statutes that define person to

Colloquy

1 include LLCs, it has to be rooted in what is the statute  
2 intended to do and what is it intended to protect. We think  
3 that, with respect to these state statutes, this type of  
4 transaction, where so much is staying the same. There's no  
5 new disclosure. There's no change in how the data is used.  
6 Maintained. Collected. Processed. Anything that matters  
7 from a perspective of consumer data privacy. That this cannot  
8 be the type of transfer that any of these state laws are  
9 intended to prohibit.

10 And so we would submit in some, and I'm obviously  
11 happy to answer Your Honor's questions, that even if Your  
12 Honor gets to 363(b)(1)(B), that we comply with applicable  
13 nonbankruptcy law. We check the boxes under GIPA. We're not  
14 in the world of a transfer or disclosure to a third party or  
15 person on the facts of this sale that we're asking Your Honor  
16 to approve.

17 Any questions on the --

18 THE COURT: I don't think so. That's very thorough.  
19 Thank you.

20 MR. HOPKINS: Just a couple -- just to circle back,  
21 Your Honor, on the preemption point because there are two  
22 Eighth Circuit decisions that I think are pretty instructive.  
23 One, and we did not --

24 Do we have -- can we have copies of the Heart of  
25 America decision?



Colloquy

1           So there's a decision. It is Heart of America Grain  
2     by Judge Bowman. The site is 123 F.3d 1098. And that's an  
3     Eighth Circuit decision from 1997. And I have a bunch of  
4     copies, if folks would like.

5           Would Your Honor like a copy?

6           THE COURT: Sure. That'd be great. Thank you.

7           MR. HOPKINS: Your Honor, this case dealt with  
8     competing grain weighing laws. There was a federal statute.  
9     The other, a Missouri law. And I would note, Your Honor,  
10    because I think you'll hear this from the states when they  
11    make their arguments. This was a case where the Court held  
12    that the state law was preempted, even though it was dealing  
13    with a state law that was in an area of traditional state  
14    concern, where courts should be or may be reluctant to find  
15    preemption. And I won't go into the intricacies of the ruling  
16    that involves interesting things about various types of  
17    certificates for the weight of grain.

18          THE COURT: Please don't.

19          MR. HOPKINS: But the Eighth Circuit stated that a  
20    state's attempt, not only to regulate grain weights in  
21    federally licensed warehouses, but to assert that function  
22    entirely is an unconstitutional exercise of state power.  
23    Notwithstanding that, the -- notwithstanding that the  
24    applicable federal statute did not expressly address the exact  
25    subject matter of the state's regulation.

Colloquy

1           And I think the analysis of how you apply that lens  
2   to this case, the objecting states' attempt to use state laws  
3   to prohibit a sale of PII that Congress specifically  
4   permitted, in other words, to assert the function of Congress  
5   in determining what standard to apply to an approval of sales  
6   of PII in 363 sales. And I think Your Honor before mentioned  
7   the sale of cocaine, which to my knowledge, 23andMe is not  
8   engaged in the business of. The preemption here is really  
9   quite narrow.

10           Congress did not look at 363 and say, notwithstanding  
11   anything contrary to state law, a debtor can use, sell, or  
12   lease property of the estate. It is a very narrow focus.  
13   What about the sale of PII? And Congress made that policy  
14   decision on the back of a case that received widespread  
15   notoriety and focus from the FTC and others. It got a lot of  
16   press. It involved the sale of PII of children. But Congress  
17   made an informed decision.

18           And I would note, for Your Honor's benefit, this  
19   Eighth Circuit case, admittedly, it dealt with field  
20   preemption, not conflict preemption. But the principle is  
21   similar, and that is states seeking to usurp the objectives  
22   and purposes of Congress in permitting sales of PII that are  
23   not prohibited by the debtors' privacy policies is preempted  
24   under conflict preemption. And courts note, and this is In  
25   re: Old Carco, which is cited in our brief, 442 B.R. 196, that

Colloquy

1 field preemption and conflict preemption may be overlapping or  
2 complementary, and field preemption and conflict preemption  
3 are usually both found based on implied manifestations of  
4 congressional intent.

5 And we would submit that under 363(b), you have a  
6 clear manifestation of congressional intent that they wanted  
7 to permit specific categories of PII laws -- or I'm sorry, PII  
8 sales, notwithstanding what nonapplicable nonbankruptcy law  
9 may be able to -- have to say about that. And I actually  
10 think, I believe every states' objection to a state cites to  
11 Your Honor the Eighth Circuit decision in Schauer. I hope I'm  
12 pronouncing that correctly. And that's 835 F.2d 1255 (sic).  
13 For the support that 363(b)(1) does not preempt state privacy  
14 laws.

15 That's a case, I believe, from 1987, which predates  
16 BAPCPA by decades. And what Schauer said, again, I will not  
17 bore Your Honor the details about patronage margin  
18 certificates. I had to look up what that was. What that  
19 said, in Schauer, the Chapter 7 trustee was trying to sell an  
20 instrument, despite state and contract laws that prohibited  
21 the sale of the instrument without the consent of I believe it  
22 was a farming co-op.

23 And the Court in Schauer said, I can't do that.  
24 363(b)(1) just says a trustee can use, sell, or lease property  
25 of the estate. Doesn't give me any authority anywhere in the

Colloquy

1 statute to say that I can just run roughshod over state law,  
2 which I can see Your Honor is considering in his mind as he's  
3 evaluating the arguments we're making. I think the exact  
4 quote is 363 did not expressly authorize the trustee to sell  
5 property contrary to the restrictions imposed by state law.

6 Well, in BAPCPA, Congress did something. It amended  
7 363(b)(1)1. And it did provide express authorization to sell  
8 PII, as long as it's consistent with the debtor -- as long as  
9 it's permitted under the debtor's privacy policy or it's  
10 consistent with the policy. Now, but what Congress did say is  
11 if a debtor is trying to violate the policy and it's trying  
12 to -- and the Court can't otherwise find that the sale is  
13 consistent with the policy, then the Court has to look to  
14 applicable nonbankruptcy law. But it's then and only then --

15 THE COURT: All right.

16 MR. HOPKINS: -- under our view of the statute.

17 THE COURT: Mr. Hopkins, since you mentioned clear  
18 statement and the word "notwithstanding", what do you make of  
19 363(1)?

20 MR. HOPKINS: May I grab my Code?

21 THE COURT: Sure. Yes, of course. Which authorizes  
22 the trustee to use, sell, or lease property, notwithstanding  
23 any provision in a contract, a lease, or applicable law that's  
24 conditioned on insolvency or financial condition or  
25 commencement of a case under this title, appointment of a

Colloquy

1 receiver, and effects of forfeiture of the debtor's interest  
2 in such property. That's express preemption, right?

3 MR. HOPKINS: I think that's right, Your Honor.

4 Now --

5 THE COURT: But with a pretty narrow focus.

6 MR. HOPKINS: Very narrow focus.

7 THE COURT: And proceeded BAPCPA. That's been around  
8 for a while. I don't remember exactly when. But if Congress  
9 wanted to preempt restrictions on the sale of PII, why didn't  
10 it either amend (l) or parallel (l)?

11 MR. HOPKINS: I think, Your Honor, because it is a  
12 narrow form of conflict preemption, and I think there is  
13 Supreme Court authority. I believe we have copies of that  
14 case as well. It's a relatively recent decision from Justice  
15 Gorsuch, I believe, who wrote the majority opinion, that says  
16 it's not just the text of the statute. You look to its  
17 structure.

18 THE COURT: Sure.

19 MR. HOPKINS: And I think there's a canon of  
20 statutory construction that says if Congress puts words in  
21 certain places of a statute and not in others, that that's  
22 intentional. And I think that Congress, in saying, Bankruptcy  
23 Court, you can permit a sale of PII as long as the debtors  
24 didn't do this thing as an initial step. And that thing is  
25 disclosing a policy that prohibits the sale of PII. I think

Colloquy

1 Congress also says the Court can permit the sale of PII if  
2 such sale or lease is consistent with such policy.

3 I think what Congress was not willing to do was to  
4 just say, Bankruptcy Court, on any set of facts, you can  
5 approve a sale of PII, notwithstanding applicable  
6 nonbankruptcy law. And the protection and the balance that  
7 Congress struck between the bankruptcy policy you heard me  
8 talk about earlier and considerations of consumer policy lives  
9 in 363(b)(1)(B).

10 THE COURT: All right. All right. I look forward to  
11 reading Heart of America. That's not one I've run across in  
12 my prep.

13 MR. HOPKINS: We have a great team who does  
14 exhaustive research, Your Honor.

15 THE COURT: I have no doubt.

16 MR. HOPKINS: I can't take credit for that find.

17 THE COURT: No doubt.

18 MR. HOPKINS: Although the main character is a man  
19 named Hopkins. No relation.

20 THE COURT: Oh. Oh.

21 MR. HOPKINS: I think, with that, Your Honor, I'd  
22 like to -- unless Your Honor has any further questions for me,  
23 I think I would cede the podium to TTAM, if that's okay with  
24 Your Honor, and then --

25 THE COURT: Yeah. Let's have the parties in favor

Colloquy

1 speak first, and then we'll hear from the states.

2 MR. HOPKINS: Thank you, Your Honor.

3 THE COURT: Okay. Thank you.

4 MR. HOPKINS: And I would just like to -- oh, my  
5 colleague reminded me. The states are -- the states are also  
6 pursuing their objection under 28 U.S.C. 959(b). I don't  
7 think I addressed that for Your Honor.

8 I think this is pretty straightforward. 28 U.S.C.  
9 959, paraphrasing, says a debtor has to manage and operate its  
10 business in accordance with state law. We agree. You heard  
11 testimony from Mr. Lefkowitz today. 23andMe goes to great  
12 efforts to operate its business in accordance -- to manage and  
13 operate its business in accordance with state law. They  
14 updated their privacy policy, I think you heard Prof. Richards  
15 testify, twenty-two times in an effort to comply with  
16 applicable state and other privacy laws. But it speaks to the  
17 management and operation of the business.

18 So yesterday, could we go violate law with respect to  
19 PII and the AGs have nothing to say about it? Absolutely not.  
20 But 363(b) is a sale outside of the ordinary course of  
21 business. Congress has articulated a statutory scheme for how  
22 those sales should be evaluated. It doesn't run afoul of 28  
23 U.S.C. 959 because a sale outside of the ordinary course of  
24 business, I think, by definition, is not management and  
25 operation of the business. I think, if it was management and

Colloquy

1 operation of the business, we'd be either not in 363(b) land  
2 at all, or we would be living under 363(c), which is ordinary  
3 course of business, which is obviously not the position we're  
4 taking here.

5 THE COURT: Makes sense.

6 MR. HOPKINS: Thank you, Your Honor.

7 THE COURT: All right. Thank you, Mr. Hopkins.

8 Mr. Kirpalani.

9 MR. KIRPALANI: Thank you, Your Honor. Susheel  
10 Kirpalani of Quinn Emanuel Urquhart & Sullivan on behalf of  
11 the TTAM parties, including Ms. Anne Wojcicki. My colleague's  
12 just going to plug in some slides, if you just give us one  
13 moment.

14 THE COURT: Sure.

15 MR. KIRPALANI: And I'm going to try to be brief  
16 because I think Mr. Hopkins covered two thirds of what I was  
17 otherwise going to address. And it's late in the day. And  
18 folks have to catch planes. So I want to give the objecting  
19 parties their due amount of time.

20 Okay. I'm actually going to skip over the concept of  
21 preemption and talk to Your Honor instead about the second  
22 prong, which is that the trustee may not sell or lease  
23 personal identifiable information to any person unless, under  
24 (B), 363(b)(1)(B), after the appointment of a consumer privacy  
25 ombudsman, that has happened, and after notice and a hearing.



Colloquy

1 That has happened, one, giving due consideration to the facts,  
2 circumstances, and conditions of such sale and the court is  
3 finding that no showing was made that such sale or such lease  
4 would violate applicable nonbankruptcy law. I did a word  
5 search on the Cornell website that has the whole Bankruptcy  
6 Code for "no showing was made". I've been doing this for  
7 thirty years.

8 THE COURT: Bet you didn't find anything.

9 MR. KIRPALANI: Never seen that phrase --

10 THE COURT: Yeah.

11 MR. KIRPALANI: -- in the Bankruptcy Code before. It  
12 actually referred me to a bunch of criminal statutes and then  
13 about beyond a reasonable doubt being the standard. I'm not  
14 urging that. It may well be a very high burden, but I'm not  
15 urging that.

16 What I am urging, though, Your Honor, is that looking  
17 at the structure of the statute, not delving into preemption,  
18 Your Honor is just interpreting this federal statute as it's  
19 written. The structure of this statute says in (A), this is  
20 the "or". It's either the first one, (A), which I'm going to  
21 come back to, or (B), after three things happen. The  
22 appointment of an ombudsman. Check. Giving due consideration  
23 to the facts, circumstances, and conditions of such sale.  
24 We're going to come to those in a moment. Finding. Sounds  
25 like a factual finding, but I think it's probably a mixed

Colloquy

1 question of fact in law. But we do want the Court to find  
2 that no showing was made. It clearly refers to the objecting  
3 party. That such sale or such lease would violate applicable  
4 nonbankruptcy law.

5 So we think it's by a preponderance of the evidence.  
6 And the states have adduced some evidence from a couple of  
7 witnesses and have pointed to some statutes. But it is their  
8 burden that they've got to show, looking at the specific facts  
9 of this transaction, not generally, not a general statement of  
10 preemption, not a general statement of law about state law  
11 from this court, but that they've proven to you that their  
12 state statute is violated by the structure of this sale, by  
13 the identity of the buyer, by whatever circumstances of  
14 privacy law that have been violated, that they have proved to  
15 you that that's happened.

16 But what they're doing is they're actually flipping  
17 the burden, and they're saying you have to affirmatively  
18 declare that the transaction complies with state law. I don't  
19 think that's what the statute says. It actually says in (A),  
20 if there's a policy in place, all you have to do is find that  
21 the sale is consistent with such policy. So you can't read  
22 into (A) a higher burden than what is actually their burden in  
23 (B). And I think that's where, from a structure of the  
24 statute perspective, they've kind of jumped over what the  
25 Court is supposed to be doing and whose burden it is to show

Colloquy

1 it.

2 But I do want to talk about the facts, circumstances,  
3 and conditions of the TTAM transaction.

4 So if we can flip the slide to the next one.

5 UNIDENTIFIED SPEAKER: That's controlled by someone  
6 else. I don't know if they can hear.

7 MR. KIRPALANI: Oh, okay. Great. So we're on slide  
8 9.

9 So here, we have the uncontroverted testimony of Ms.  
10 Wojcicki in paragraphs 14 and 15 that TTAM's privacy policy  
11 will be the same as 23andMe's privacy statements in effect as  
12 of the bankruptcy filing, plus "additional privacy forward  
13 enhancements contained in TTAM's voluntary consumer protection  
14 and privacy safeguards term sheet." Beyond that, TTAM has  
15 committed to maintain in perpetuity 23andMe's current policies  
16 that allow customers -- consumers, I'm sorry, to delete their  
17 accounts and genetic material and to opt out. Those are the  
18 facts. The record facts in the case.

19 In paragraph 15, she also testified that , "TTAM will  
20 comply with all obligations under applicable state privacy  
21 laws, including those governing genetic privacy and consumer  
22 health privacy, as if it were a for-profit entity". So beyond  
23 actually what the law requires, and those are the unique  
24 special facts of this transaction, which I can't get my head  
25 into the minds of the NAAG states, who agreed to rest on their

Colloquy

1 papers as long as it's TTAM that's acquiring but reserving  
2 their rights to object if it were another bidder. But you  
3 could see the logic of perhaps based on the specifics of this  
4 transaction and this buyer, the unique facts and circumstances  
5 support that there is no showing that their laws would have  
6 been violated.

7 The next slide. Oh, whoever is in control of it.  
8 Thank you.

9 You heard Ms. Wojcicki testify about the TTAM  
10 voluntary privacy commitments. This demonstrative was  
11 discussed during her testimony. I don't need to go through  
12 it. Those are the facts and circumstances.

13 If we can go to the next slide 11.

14 We also heard the testimony of Mr. Swift from Moelis  
15 that the acquired assets and assumed liabilities will be  
16 transferred to a newly formed and wholly owned nondebtor  
17 subsidiary called NewCo. That's the drop down feature that  
18 Mr. Hopkins talked about, again, the specifics of this  
19 transaction. And I think where it's important to focus on  
20 this is because we're going to hear from our friends at the  
21 objecting states that this transaction either was -- they may  
22 say no due process. I believe they've said in other circles  
23 it's a sham, or it wasn't in good faith. We're specifically  
24 asking the Court to determine that this buyer, that this  
25 transaction was in good faith.

Colloquy

1           There is no evidence. They had people on the witness  
2     stand. They had Moelis. They had Ms. Wojcicki. They had  
3     debtors' other representatives. Nobody asked a single  
4     question about why was this transaction structured this way.  
5     Nobody adduced any evidence that it was done in bad faith.  
6     And so the Court has no basis to determine it's anything that  
7     remotely resembles bad faith. This is not a sham. This is an  
8     effort by the debtors constructively to try to meet the  
9     objecting states where they stood on their papers and in order  
10    to anticipate and resolve objections. And in point of fact,  
11    it worked for most of the states. And we think that that's an  
12    important factor for the Court to consider, too, under Section  
13    363(b) (1) (B).

14           Next slide.

15           And this is just a diagram of -- Your Honor knows  
16    this transaction well, now, but it's important when you're  
17    looking at the statutes to ask yourself is there a transfer of  
18    data to a third party. Your Honor asked that question on the  
19    first morning of the hearing, and so I ad libbed it with Ms.  
20    Wojcicki about whether even she herself will be given access  
21    to the data as one of the three members of the governing body  
22    of TTAM. And she said no. And she hasn't even had access to  
23    that genetic data as the CEO and founder of 23andMe.

24           So there is no evidence in the record that any  
25    genetic data regulated by these specific GIPA statutes will be

Colloquy

1 transferred to any third party.

2 The next statute. I'm sorry. The next slide is the  
3 statute. I think Your Honor can look generally at these  
4 consumer privacy acts to determine what are they regulating.  
5 It's very important not to take statutes out of their context.  
6 What are they trying to regulate? I think that's an important  
7 inquiry when determining whether or not state law has been  
8 violated. Our position is they don't regulate M&A activity at  
9 all.

10 In the California Consumer Privacy Act, which is the  
11 more umbrella act, not the specific genetic one, California  
12 statute specifically says a business does not sell personal  
13 information when it's part of a merger, acquisition,  
14 bankruptcy, or other transaction in which the third party  
15 assumes control of all or part of the business. That's not a  
16 sale, even though, in your mind, of course, you think of it as  
17 a sale. But that's not the work that these statutes are  
18 trying to do.

19 In the NAAG state's pleadings, and they did rest on  
20 their pleadings and that's fine, they stated a change in  
21 ownership without a sale and transfer of the customer data is  
22 legally possible. The debtors are corporations, and their  
23 shareholders are owners. Through the purchase of the debtors'  
24 stock, the proposed buyers could effectuate a change in  
25 ownership, arguably without causing a sale, transfer, or

Colloquy

1 disclosure of the assets. It's exactly what the debtors are  
2 doing to my client.

3 Let's go to slide 14.

4 Apologies that we didn't cite this case in our brief,  
5 but we found it subsequently. In the Seventh Circuit, there  
6 was a transaction where Ancestry, the stock of Ancestry was  
7 sold to Blackstone. Big private equity company. There was a  
8 class of consumer plaintiffs who came forward and brought a  
9 lawsuit under their version of GIPA, in Illinois, saying that  
10 by virtue of a private equity owner now owning ancestry.com,  
11 the private equity owner has violated GIPA because it is  
12 compelling the transfer of genetic data to someone else  
13 because the equity owner could now cause the subsidiary to  
14 just give us all your genetic data because those Blackstone  
15 private equity executives love to do that on a Sunday evening.  
16 But that's what the lawsuit was about.

17 Here's what the Seventh Circuit said. "The fact that  
18 the acquisition took the form of an all stock purchase further  
19 cuts against the plaintiffs' theory of liability. All we can  
20 say with certainty about Blackstone's all stock acquisition of  
21 ancestry is that a change in ownership occurred. Nothing  
22 more." We think that's directly relevant and analogous to  
23 TTAM, which of course is no private equity firm, it's a  
24 charitable foundation, acquiring the stock of NewCo under the  
25 debtors' structure for this sale. And for the record, that

Colloquy

1 cite is 66 F.4th 687 at 689 (7th Cir. 2023).

2 I think the other sections that I would have covered  
3 of our presentation were adequately covered by Mr. Hopkins.  
4 Let me just double check. Yeah, I think that's all I have  
5 that can --

6 THE COURT: Okay.

7 MR. KIRPALANI: -- I think useful. Thank you, Your  
8 Honor.

9 THE COURT: Thank you, Mr. Kirpalani.

10 We have committee or others in support?

11 Yes, Ms. Ryan.

12 MS. RYAN: I just want to make a clarification about  
13 something that this gentleman said. And I'm so sorry. I  
14 don't remember your name.

15 MR. KIRPALANI: Oh, it's Susheel Kirpalani.

16 MS. RYAN: It's Susheel? Thank you.

17 That Mr. Susheel said. I don't believe that the  
18 Court should take into consideration the NAAG states, whether  
19 we say the law is violated or not violated. Fact is, we're  
20 not arguing it. I stayed seated back there, as hard as it is  
21 for me sometimes to keep my mouth closed. And based upon the  
22 concessions that we got, the extra concessions for exhibit D,  
23 we agreed not to argue that.

24 And so we're not conceding either way that the NAAG  
25 states' laws are violated. And in fact, we negotiated a



Colloquy

1 special term for the sale order. It's paragraph 37, and it  
2 says, "The findings and provisions of this order regarding the  
3 transfer of customer data are based upon the specific facts  
4 and circumstances of this case are of no precedential value  
5 and do not waive any state's laws."

6 So I think we're neutral on that point. And I just  
7 wanted to make sure Your Honor was aware of it.

8 THE COURT: Okay. Well, while you mentioned that, I  
9 don't get to decide what's of precedential value. If what you  
10 mean is that your clients can disagree in the next case and  
11 they're not collaterally estopped or something like that,  
12 that's fine.

13 MS. RYAN: Yes.

14 THE COURT: Okay. I'm good with that.

15 MS. RYAN: That's exactly what we mean.

16 THE COURT: I'm good with that. Okay.

17 MS. RYAN: Thank you. Any other questions, Your  
18 Honor?

19 THE COURT: No, I don't think so.

20 MS. RYAN: Thank you.

21 MR. VISCITO: Your Honor.

22 THE COURT: Mr. Viscito, let's wait for the folks in  
23 the courtroom, please.

24 MR. VISCITO: Okay. Thank you.

25 MR. ADAMS: Good afternoon, Your Honor. Jason Adams,

Colloquy

1 Kelley Drye & Warren, on behalf of the committee.

2 THE COURT: Adams.

3 MR. ADAMS: Couple things. I'm not going to touch on  
4 the NAAG states at all because I certainly don't want Ms. Ryan  
5 coming up here and saying that I said something wrong. So I'm  
6 not going to do that. Your Honor, I also have no  
7 demonstratives, for better or for worse.

8 So two days ago, I used a silly term. I said  
9 perfect, and that has been repeated time and time again today.  
10 And I appreciate Prof. Cate validating that statement. But  
11 quite frankly, it was hyperbole. Right. And I think  
12 counsel's indicated that. Right. There is no such thing as a  
13 perfect sale in bankruptcy. Certainly not outside of  
14 bankruptcy, and a hundred percent not in bankruptcy. There's  
15 no such thing as a perfect sale because in bankruptcy, rights  
16 are always affected, and they're always impacted. That's kind  
17 of the very nature of the Chapter 11 process.

18 In Chapter 11, creditors' rights are always impacted.  
19 Often, hopefully not this case, but often, creditors receive  
20 little to no value. Shareholder equity rights are completely  
21 wiped out in bankruptcy all the time. Damages claims are  
22 capped by Section 365 of the Bankruptcy Code. Contracts and  
23 leases are assigned, notwithstanding anti-assignment  
24 provisions in contracts. Warranties are eliminated.  
25 Creditors can affirmatively -- or can vote on a plan and say,

Colloquy

1 no, I don't support this plan, and they're bound by it. So  
2 the Bankruptcy Code, it's inherent in the nature of it that  
3 rights are impacted.

4 So with that in mind, I'm not going to say perfect  
5 again, but I'm going to say if it's not this sale, if this  
6 sale is not good enough, then what sale ever possibly could  
7 be, given the facts and circumstances of this case, because  
8 and this has been said by counsel repeatedly, what this sale  
9 does is it preserves the business. It maximizes value. And  
10 it ensures that customer rights, whatever they are under the  
11 policies, are unaffected. They're unaltered and likely  
12 enhanced, given the additional protections that TTAM has put  
13 into its APA.

14 The continue will operate as it has been. It will be  
15 the same people. It'll be the same structure. It'll be the  
16 same mechanisms. We heard Ms. Wojcicki say that yesterday.  
17 Nobody new is going to have access to PII. And as Ms.  
18 Wojcicki said herself, I think Mr. Kirpalani referred to this  
19 as well in his discussion, Ms. Wojcicki as the cofounder has  
20 no access to anybody's PII, other than her own.

21 So if this sale can't be approved, then I think what  
22 the states are truly arguing here is that there is absolutely  
23 no asset sale in bankruptcy that can ever happen. And we're  
24 not necessarily talking about an asset sale here. We are  
25 talking about two-level transaction. But there's no asset

Colloquy

1 sale that can ever be approved in bankruptcy, regardless of  
2 what 363(b)(1) says, other than with express consent from  
3 customers. And maybe one day, Your Honor, that is what  
4 Congress will provide. But that's not what the section -- not  
5 what the statute says today.

6 And we unfortunately, or maybe fortunately, we don't  
7 play in the world of what the law should be. That's a wholly  
8 different branch of the government, which I am not qualified  
9 to be a part of. We have to live with what the Bankruptcy  
10 Code says now. And we believe, consistent with the debtor's  
11 position, with TTAM's position, that 363(b)(1) is clear. And  
12 I'm not going to repeat those arguments today because there  
13 are a lot of people who want to catch flights tonight.

14 But I will close with what I think the ultimate goal  
15 of Chapter 11 is, which is to allow companies to restructure,  
16 with the corresponding concept of do as little harm as humanly  
17 possible. I think that's one of the core features of the  
18 Chapter 11 process. And so I ask, what is the greater harm  
19 here?

20 Is it to approve a sale where the customer's rights  
21 are maintained and enhanced? They'll continue to have access  
22 to the services that they signed up for. The business is  
23 going to be maintained the same way, same structure, same  
24 limitations, same privacy policies, and maybe some  
25 enhancements.

Colloquy

1 Or is the greater harm potentially wiping out those  
2 rights entirely because people did not affirmatively say, yes,  
3 I want this transaction at this point in time and again,  
4 eliminating their rights to the services, eliminating the  
5 potential of research opportunities, all because again, these  
6 consumers did nothing? I don't think that's necessarily  
7 consistent with what the states' logic is here and ultimately,  
8 what, again, the purpose of these statutes were, which is to  
9 protect consumers.

10 And then, of course, there's the harm to everybody  
11 else, Your Honor, that needs to be factored in as we consider  
12 this because it's not just the company. It's not just the  
13 customers. There's a whole bunch of other stakeholders  
14 involved here. And again, customers certainly will maintain  
15 their services. That's important. They'll have the same  
16 privacy rights they had before and more. Employees, if this  
17 transaction doesn't go through, they will not have jobs.  
18 Creditor recoveries will clearly be little to nothing. Equity  
19 holders will be completely wiped out if the sale transaction  
20 is not approved.

21 And again, we can't do the crystal ball here today,  
22 but if we can't approve a transaction of this type, I'm not  
23 sure there's any transaction that we can necessarily approve.  
24 And that potentially leads us down a Chapter 7 route. And if  
25 it's a Chapter 7 route, they still don't know what the

Colloquy

1 protections are for the customers at that point. And it could  
2 be potentially worse.

3 So we believe, based upon the law, the legal  
4 arguments, the balance of harms, the purpose of Chapter 11,  
5 that this is a sale transaction, as currently structured, that  
6 works under the law, whether you look under Section  
7 363(b)(1)(A) or (B). We don't think you have to get to (B)  
8 for all the reasons that have been said today. But if you do,  
9 we still believe it complies with applicable state law. We  
10 still believe, considering all the facts and circumstances,  
11 that it is appropriate. And for those reasons, the committee  
12 is supportive of the sale transaction.

13 THE COURT: Thank you, Mr. Adams.

14 MR. ADAMS: Thank you, Your Honor.

15 THE COURT: Others in the courtroom in favor.

16 MS. DWOSKIN: Very briefly, Your Honor. Good  
17 afternoon. Shari Dwoskin of Brown Rudnick on behalf of the ad  
18 hoc group of equity holders. We filed a statement in support  
19 of the sale at docket number 804.

20 The ad hoc group was very pleased that the sale  
21 process resulted in a sale price of over five times the  
22 initial bid at auction, and we believe that this is more than  
23 sufficient to pay all creditors in full and provide meaningful  
24 recovery to shareholders. And for that reason, Your Honor, I  
25 really wanted to raise to rise to speak. We haven't heard a

Colloquy

1 lot about the economics of this deal. We haven't heard from  
2 equity, who I believe is the fulcrum security here.

3 And I think that it's important to consider what the  
4 economics would mean if this sale was approved and if it's not  
5 approved, as the committee laid out, particularly given that  
6 this is a sale to an affiliate of an insider. The process was  
7 competitive, as the evidence showed. As the Court is aware,  
8 with TTAM and Regeneron appearing here after the initial stage  
9 of the auction seeking a process to submit additional bids,  
10 that process was overseen by the special committee. It was  
11 fair. It resulted in a sale price that was more than anybody  
12 expected that the sale would provide.

13 And I won't go into the 363(b)(1) factors. I think  
14 the debtors and TTAM have laid those out in detail.

15 But I do want to say, Your Honor, if the sale is not  
16 approved, then the estate and the equity holders, who are the  
17 residual interest holders in the estate, would be  
18 significantly worse off. It's not at all clear that the  
19 Regeneron bid or any other bid would be acceptable to the  
20 states for the reasons that the committee laid out. And the  
21 likely outcome would be either that the PII would end up in  
22 foreclosure or in a Chapter 7, which would result in  
23 significant destruction of value. And it's unlikely that the  
24 result would be any better for customer privacy than the sale  
25 to TTAM.

Colloquy

1           And I want to stress, Your Honor, that because  
2   customers always have the right to delete their data, it's in  
3   the economic interests of the company to make privacy as  
4   strong as possible, right, to retain as many customers as  
5   possible. That's where the value of the company lies.

6           So for those reasons, Your Honor, the ad hoc group is  
7   in favor of the sale, and we request that the sale be  
8   approved.

9           THE COURT: Thank you, Ms. Dwoskin.

10          MS. DWOSKIN: Thanks.

11          THE COURT: Yes, sir.

12          MR. GLUCK: Good afternoon, Your Honor. I'll be very  
13   brief. For the record, Kristian Gluck, Norton Rose Fulbright,  
14   on behalf of JMB Capital Partners Lending, the DIP lender  
15   here. Your Honor, we did file a joinder in support of the  
16   sale at docket 790. I won't repeat it. I won't belabor it.  
17   I also have a flight later I'd like to catch.

18          But we do support the sale, Your Honor. It's been a  
19   fantastic result. Kudos to the debtors and all their  
20   professionals for the result here. It justifies JMB's  
21   decision to make this DIP loan in the beginning. And we do  
22   ask that the Court approve the sale. Thank you.

23          THE COURT: Thank you.

24          Others in the courtroom in favor.

25          All right. On the Webex.



Colloquy

1 Mr. Viscito, briefly. I believe your counsel just  
2 spoke. So let's keep it tight, please.

3 MR. VISCITO: Yes, Your Honor. I'll be brief. To  
4 the extent the -- to the extent the Court looks beyond the  
5 Bankruptcy Code in making determinations in this individual  
6 case, I would ask the Court to consider common sense in its  
7 deliberation. TTAM is an acronym for 23andMe, as identified  
8 in the CPO report. And the reason seems to be very clear.  
9 The business under 23andMe is the exact business that would be  
10 operated under TTAM.

11 The Court has heard no state consumer witness  
12 describing how they would be harmed by the equity purchase of  
13 TTAM of the business of 23andMe or the entity. That's because  
14 they will not be harmed. Creditors and equity shareholders  
15 will be considerably harmed if this sale is not approved or if  
16 it's approved with an opt in condition.

17 I would ask the Court to approve the sale with no  
18 conditions or provisions for an opt in or express consent.  
19 Thank you, Your Honor.

20 THE COURT: Thank you, sir.

21 Others on the Webex in favor of the sale.

22 All right. To the objecting states. Who's first?

23 MR. NADAL: Good afternoon, Your Honor. The People  
24 of the State of California object to the proposed sale because  
25 debtors refused to comply with California state law

Colloquy

1 restrictions on the transfer of human genetic data and  
2 biological samples. I want to start here by pointing out that  
3 we have maybe a few states continuing to object, but we're not  
4 small. The objecting states have approximately eighty-six  
5 million residents. That's twenty-five percent of the country.  
6 And with no offense to my other colleagues, but California and  
7 Texas alone are seventy million. That's twenty percent of the  
8 country. It's just me here. I didn't have time to put  
9 together a fancy PowerPoint or come up with a really great  
10 thing.

11 But my thing that I'm going to have here is that this  
12 is just wrong. It's wrong from a bankruptcy procedural  
13 standpoint. It's wrong from a California law standpoint. And  
14 it's wrong from a bankruptcy substantive standpoint.

15 THE COURT: All right. Mr. Nadal, let me ask you.

16 MR. NADAL: Yes.

17 THE COURT: Do you agree that if the debtors  
18 confirmed a Chapter 11 plan that restructured their balance  
19 sheet and resulted in TTAM becoming the new equity owner of  
20 the reorganized debtor, your state's law would not be an  
21 obstacle to confirmation of that plan?

22 MR. NADAL: Your Honor, I agree that debtors would  
23 have a fighting chance. So yes.

24 THE COURT: Okay. And that would take two months,  
25 result in a massive cash burn, and unbelievable professional

Colloquy

1 fees; is that fair?

2 MR. NADAL: Yes, Your Honor.

3 THE COURT: Okay. How would consumers in your state  
4 be better off if the debtors took that route?

5 MR. NADAL: Consumers would be better off if the  
6 debtors took that route because in that circumstance, we have  
7 express Congressional articulated preemption law. We don't  
8 have that in the 363 context.

9 THE COURT: No, it's not a preemption issue. It's  
10 that your state's law wouldn't apply to that transaction.

11 MR. NADAL: Yes, Your Honor, because Congress  
12 specifically articulates in 1123(a)(5) that notwithstanding  
13 applicable state law, a plan may do X, Y, and Z.

14 THE COURT: But we never get to that. How would  
15 California's statute apply to the reorganization of this  
16 debtor under new equity owners?

17 MR. NADAL: Through a bankruptcy plan?

18 THE COURT: Right.

19 MR. NADAL: I do not believe it would, Your Honor.

20 THE COURT: Okay. So we don't need to get to  
21 preemption. Right. There's nothing to preempt. State law  
22 doesn't bar that transaction, so Congress doesn't need to  
23 preempt it. Right.

24 MR. NADAL: The reason that California law would not  
25 apply to a transaction that they structured through a Chapter

Colloquy

1 11 plan is because Chapter 11 specifically has notwithstanding  
2 applicable state law within it.

3 THE COURT: All right. If we went down that road and  
4 confirmed a plan two, three months from now, shareholders in  
5 California would be demonstrably worse off than if this  
6 transaction goes forward as structured; is that is that fair?

7 MR. NADAL: Essentially, Your Honor, yes.

8 THE COURT: Okay. Let's take it a step further.  
9 Let's take TTAM out of the picture. The debtors could confirm  
10 a plan that gives ownership to someone totally unaffiliated.  
11 Ancestry. Or want to pick on Procter & Gamble, a consumer  
12 products company. A life insurance company could be the new  
13 owner of the reorganized debtors. Your state's law wouldn't  
14 apply to that transaction, would it?

15 MR. NADAL: The California state law, GIPA, would not  
16 apply to prevent the reorganization from happening, but it  
17 would apply and follow the data because the new purchaser  
18 would be defined under California statute as a direct-to-  
19 consumer genetic testing company. And so all of the --

20 THE COURT: Right. There might be -- there might be  
21 restrictions on the ability of New 23andMe to give the data to  
22 its new life insurance overlord, but there's nothing in the  
23 statute that would prohibit that life insurance company from  
24 owning reorganized 23andMe, as long as nothing further  
25 happened, right?

Colloquy

1 MR. NADAL: I believe that's correct, Your Honor.

2 THE COURT: Okay. And no consumers would have to opt  
3 into that transaction. It's just a change of ownership,  
4 right?

5 MR. NADAL: Correct.

6 THE COURT: Okay. If they didn't like it, they could  
7 delete their accounts?

8 MR. NADAL: And if they did not like it, I believe  
9 they could. Yes, Your Honor. And they could also vote  
10 against the plan.

11 THE COURT: If they're creditors.

12 MR. NADAL: Correct.

13 THE COURT: Which, if they were subject to the data  
14 breach, they could vote. Let's put it that way.

15 All right. So as I understand it, and I think this  
16 applies to all five states, the state regulates transfers of  
17 genetic information but not ownership of the companies that  
18 hold that information; is that fair?

19 MR. NADAL: I believe that's fair, Your Honor.

20 THE COURT: Okay. So why should I interpret your  
21 GIPA statute to prohibit something that's technically a  
22 transfer, maybe it's technically a transfer, but it has no  
23 effect except to facilitate the change of ownership that on  
24 its own would be unobjectionable?

25 MR. NADAL: Because the mechanics and operation of

Colloquy

1 the bankruptcy law matter.

2 THE COURT: So it sounds like you're saying the  
3 mechanics and operation of state law matter but --

4 MR. NADAL: Your Honor, what I'm saying is that the  
5 mechanics of Section 363 matter.

6 THE COURT: So we're talking about form versus  
7 substance. Right. Okay. Is there some reason to believe --

8 MR. NADAL: Not entirely, Your Honor.

9 THE COURT: Okay. How are we talking about  
10 substance?

11 MR. NADAL: We're talking about substance because  
12 363, under the arguments that we are making based on In re:  
13 Schauer and other cases, a transfer under Section 363 must  
14 comply with state law restrictions on property of the estate.  
15 That doesn't apply in a Chapter 11 plan context. And in a  
16 sense, that's also our sub rosa plan argument that we have  
17 made. That moving a Section 363 sale where the equity toggle  
18 is invoked a couple days beforehand, it doesn't really matter  
19 when it's invoked, but invoking this equity toggle to do what  
20 you can do under a Chapter 11 plan is denying the procedural  
21 safeguards that are in the Chapter 11 plan process. Congress  
22 has a Chapter 11 process, and that should be followed here.

23 THE COURT: And what would be different if it were  
24 followed here, other than the loss of eight figures' worth of  
25 dollars?

Colloquy

1 MR. NADAL: We would be proceeding under a plan with  
2 the procedural safeguards that exist under it.

3 THE COURT: What procedural safeguards are present  
4 there that aren't here?

5 MR. NADAL: There is a disclosure statement.

6 THE COURT: What would be disclosed in the disclosure  
7 statement that would cause any rational creditor or  
8 shareholder of this company to vote against the plan?

9 MR. NADAL: Your Honor, I don't know at this point.

10 THE COURT: Okay. Tell me about sub rosa plan  
11 because when I think sub rosa plan, I think that the sale  
12 dictates which creditors are going to get what. I think that  
13 it defines the contents of the plan. How is any of that  
14 happening here?

15 MR. NADAL: Sure. The way that is happening here is  
16 because under Section 363 allows for the use, sale, or lease  
17 of estate property. It doesn't provide for the creation of a  
18 debtor NewCo. You can do and create a debtor NewCo through a  
19 Chapter 11 process.

20 THE COURT: How is creating a subsidiary not a use of  
21 property?

22 MR. NADAL: It's not a use of property because in the  
23 Chapter 11 plan statutes, there is different language that's  
24 used to describe that.

25 THE COURT: Okay. Anything more to the sub rosa plan

Colloquy

1 argument, other than the fact that a subsidiary is being  
2 created?

3 MR. NADAL: No, Your Honor.

4 THE COURT: All right. Please continue.

5 MR. NADAL: Sure. I'd like to briefly make some  
6 express bankruptcy requests here.

7 The first here is in bankruptcy procedure, two quick  
8 comments. The first is that the People request that if you  
9 grant the motion, the fourteen day stay and Rule 6004(h)  
10 remain in place.

11 Second, again, the bankruptcy problems that exist  
12 with NewCo, as I just attempted to articulate, are  
13 substantive. Debtors have not pointed to any authority that  
14 you can create a new business through 363, which we just  
15 discussed. But then debtors are stuck with the 363(m)  
16 problem. In order to evade application of California law,  
17 debtors are arguing that NewCo is an affiliate of debtors. If  
18 that's the case, then NewCo is not the customary third-party  
19 purchaser that is entitled to 363(m) protection.

20 In addition, NewCo is not providing any true  
21 consideration. It has no assets. It has nothing real to  
22 offer debtor in exchange for the genetic data. All it does is  
23 receive this genetic data and give an IOU that it never  
24 actually pays out because TTAM is the one that is paying the  
25 debtors.



Colloquy

1 THE COURT: Okay. So let me ask you. If a company  
2 creates a subsidiary, at that moment, the subsidiary has no  
3 value.

4 MR. NADAL: Yes, Your Honor.

5 THE COURT: If the company puts 305-million dollars'  
6 worth of assets into the subsidiary, what is the stock of the  
7 subsidiary worth?

8 MR. NADAL: 305-million dollars.

9 THE COURT: Okay. And why is that not consideration  
10 for purposes of fraudulent transfer statute? Why is that not  
11 reasonably equivalent value for purposes of fraudulent  
12 transfer statute?

13 MR. NADAL: It's not reasonably equivalent value  
14 because all that NewCo has is received 305-million dollars,  
15 and it wrote a note for 305-million dollars.

16 THE COURT: What makes that fraudulent transfer? Is  
17 it an attempt to hinder, delay, or defraud creditors of the  
18 debtors?

19 MR. NADAL: Your Honor, it's not attempt to hinder,  
20 delay, or defraud creditors of the debtor. It's an attempt to  
21 evade application of California law.

22 THE COURT: Okay. And so I understood your argument  
23 to be a fraudulent transfer argument. Does the fraudulent  
24 transfer statute in California contemplate attempts to evade  
25 state law?

Colloquy

1 MR. NADAL: No, Your Honor. What I was saying is  
2 that NewCo wasn't providing consideration for 363(m) purposes.

3 THE COURT: For 363(m) purposes?

4 MR. NADAL: Yes, Your Honor, because the money that  
5 flows in this transaction goes from TTAM to debtor. Doesn't  
6 go from TTAM to NewCo to debtor.

7 Additional 363(m) problems is that debtors have not  
8 established that NewCo qualified as a bidder. Did not  
9 participate in the auction. And I believe, I'll discuss this  
10 later, the testimony shows that the equity toggle, which Mr.  
11 Walper viewed as adding value and if debtors are correct,  
12 permits elimination of opt in consent, which Mr. Haight (ph.)  
13 used as a prohibition and extremely costly, was never  
14 marketed.

15 So now, I'd like to move on to --

16 THE COURT: Who was required to market what? I'm  
17 sorry.

18 MR. NADAL: Your Honor, what I'm saying is that the  
19 equity toggle was never marketed in the auction process.

20 THE COURT: All right. Was the State of California  
21 going to buy these assets?

22 MR. NADAL: No, Your Honor.

23 THE COURT: Why do you care?

24 MR. NADAL: I care because if there's a 363(m)  
25 finding as to the transfer to NewCo, our appellate rights will

Colloquy

1 be -- there will be a statutory mootness issue.

2 THE COURT: But what does the failure to market the  
3 toggle have to do with 363(m)?

4 MR. NADAL: 363(m) requires that it's a third-party  
5 purchaser for value. And the argument I'm making here is that  
6 by failing to market the equity toggle, if debtors are correct  
7 that that adds value, they did not put it to the market. So  
8 there was no test of whether or not that's a proper purchase  
9 price under an equity toggle.

10 THE COURT: So step two of the transaction. 23andMe  
11 sells the stock of NewCo to TTAM, a third party, for value.  
12 Why doesn't 363(m) apply to that?

13 MR. NADAL: I'm not arguing that 363(m) does not  
14 apply to that. I don't think I have established testimony as  
15 to that. What I believe that I've established testimony as to  
16 is that the transfer from -- the genetic data from 23andMe to  
17 NewCo is not entitled to 363(m) protection, such that if we  
18 prevail on appeal, those assets can return to the estate.

19 I'd like to --

20 THE COURT: Okay. Please proceed.

21 MR. NADAL: Yes, Your Honor. I'd like to proceed to  
22 GIPA. We've had a lot of discussion about this in the  
23 courtroom, and so I'd like to just focus on that GIPA applies  
24 to NewCo.

25 To start, section 2.8(a) of this asset purchase

Colloquy

1 agreement still envisions a transfer or disclosure. It says  
2 sellers may elect to sell, transfer, convey, assign,  
3 deliverance that over to NewCo all of the industry data, which  
4 includes biological samples and genetic data. That data is  
5 leaving the bankruptcy estate, and that is unquestionably a  
6 transfer, as defined under the Code.

7 Next, there was a lot of discussion about the  
8 affiliate exemptions. There is no affiliate exemption in  
9 California's GIPA. And similar to the argument raised by my  
10 colleague in Tennessee in his supplemental brief, California's  
11 legislature knows how to create an affiliate-ish exemption.

12 Mr. Hopkins is correct that California CCPA does not  
13 have an affiliate exemption. But it does define business to  
14 include any entity that controls or is controlled by the  
15 original company, meaning fifty percent or more of the voting  
16 share, and has common branding. That's California Civil Code  
17 section 1798.140(d)(2). This responds to debtors' slide 18,  
18 where they're talking about how this is within, not from, a  
19 direct-to-consumer genetic testing company. California's  
20 legislature knows how to create this affiliate subsidiary  
21 exception. They did it for the CCPA. They did not do it for  
22 GIPA.

23 Now, I'd like to talk about the third party issue.  
24 Debtors talk about the Wesco case. Wesco is a Southern  
25 Bankruptcy Texas decision, interpreting the interplay of two

Colloquy

1 sections of an indenture agreement about an open market  
2 purchase. There, the Southern Bankruptcy of Texas had a  
3 recent Fifth Circuit decision interpreting the meaning of an  
4 open market purchase laws. Southern Bankruptcy of Texas Judge  
5 Isgur found that the third party at issued there, a hundred-  
6 percent equity owner with control of the board, was not a  
7 third party under the terms of that 2027 indenture. The word  
8 "affiliate" was a defined term in that document. The court  
9 considered the context and the intent of the parties.

10 So what debtors would have this Court do is take an  
11 interpretation of "affiliate" derived from a definition in a  
12 bond issuance that was interpreting an open market purchase  
13 clause, where there was apparently on-point circuit level  
14 decision. That doesn't exist here. GIPA does not use  
15 affiliate.

16 Further, on GIPA, I came out in testimony that  
17 debtors supported GIPA, both in their blog post and in the  
18 legislative history that debtors cite in footnote 36.  
19 Finally, there's another exception in GIPA. But neither NewCo  
20 or TTAM are service providers, nor do they propose to be.

21 Now, finally, on this new transaction, that why it  
22 should be subject to California's Genetic Privacy Act. And we  
23 asked the Court in our brief to look through the two step.  
24 This is a sale of genetic data to TTAM. TTAM's principal  
25 thinks that she's getting the genetic data. On the most

Colloquy

1 friendly of redirects, she testified that her assumption is  
2 that she is getting the assets, the data, substantially the  
3 same way as before. Now, to his credit, counsel tried to  
4 salvage that testimony by asking her to confirm that she has a  
5 lot of lawyers and that she relies on them to help. But the  
6 lawyers aren't even acting as if TTAM isn't getting the  
7 genetic data.

8 All of the negotiated benefits in the voluntary  
9 consumer protection and privacy safeguards term sheet. What  
10 debtors witness' claim add value. All of those apply to TTAM.  
11 If you look at the preamble, it says that TTAM is buying  
12 substantially all the assets. TTAM is implementing the  
13 procedures. TTAM is notifying all customers that TTAM is the  
14 expected purchaser of debtors' assets. TTAM is saying it will  
15 adhere to 23andMe's privacy policy. And then it goes on in  
16 the future transfers and foreign entities section. The entire  
17 equity toggle was designed so that TTAM doesn't get the  
18 genetic data because TTAM is a third-party.

19 But when asked, TTAM's principal testified that these  
20 enhancements are going to apply to old and new customers.  
21 That is, TTAM is getting the data. It's getting the data of  
22 the old customers. And that's because we know what's going to  
23 happen once TTAM gets NewCo. When asked by my colleague from  
24 Kentucky, TTAM's principal testified that TTAM would absorb  
25 NewCo. So they're trying to have it both ways.

Colloquy

1 TTAM has got the limited and conditional acceptance  
2 of the different states who agreed to the newly proposed  
3 equity sale to TTAM. That's at ECF 823. So either NewCo is  
4 getting everything, and TTAM just has ownership and not access  
5 to any of the data, in which case all of these voluntary  
6 exhibit D enhanced protections don't apply to the old  
7 customer's data, or it's a transfer to TTAM.

8 THE COURT: Why can't TTAM, as parent company,  
9 implement policies applicable to its entire new corporate  
10 family?

11 MR. NADAL: It can. That's not what they proposed to  
12 do here. They are saying that TTAM is purchasing  
13 substantially all the assets. They're providing what they  
14 call enhanced privacy safeguards for TTAM's handling of the  
15 genetic data.

16 THE COURT: Under the California statute, if the  
17 direct-to-consumer company is owned by a parent company, does  
18 anything prevent those two companies from merging?

19 MR. NADAL: I'm not sure, Your Honor.

20 THE COURT: Okay. Go ahead.

21 MR. NADAL: In addition, I was prepared to take a  
22 moment to address why, at least in California, these privacy  
23 enhancements are basically illusory because California  
24 requires many of these privacy enhancements. It's more  
25 protective for some of them. But I'm not going to walk

Colloquy

1 through each one to explain where California's GIPA actually  
2 is more protective, unless Your Honor would like me to.

3 THE COURT: No, that's okay. Thank you.

4 MR. NADAL: All right. So California law already  
5 requires most of these things are stronger, and all that TTAM  
6 is doing is exporting watered down versions of California law,  
7 which, I will say, I understand why the other states that  
8 don't have California's law view that as a win and as a reason  
9 to either support the sale or conditionally withdraw. But I'm  
10 here representing the People of the State of California, and  
11 California law gives those people more.

12 Now, I'd like to turn to Section 363(b)(1) conflict  
13 preemption argument. This is wrong for a couple different  
14 reasons. First, this isn't a preemption statute. Debtors'  
15 implied conflict preemption argument is based on out-of-  
16 circuit authority. They cite a Southern District of New York  
17 case about how implied conflict preemption is appropriate  
18 where state law frustrates and undermines actions taken under  
19 the Code. But debtors aren't in the Southern District of New  
20 York. We're in the Eighth Circuit. And in the In re: Schauer  
21 case, the Chapter 7 trustee made that exact same argument. He  
22 contended that state law may not frustrate the purposes and  
23 objectives of federal bankruptcy law. The Eighth Circuit  
24 rejected that argument as without merit.

25 THE COURT: I think the debtors are conceding that



Colloquy

1 outside PII, Schauer remains good law. But their argument is  
2 that something happened in 2005 that brought preemption into  
3 363(b)(1).

4 MR. NADAL: Yes. Do you want me to discuss that now  
5 or a little bit later?

6 THE COURT: Go ahead. Do it. I don't mean to  
7 give --

8 MR. NADAL: No, that's all right.

9 THE COURT: -- you a new order of argument. I'm  
10 sorry.

11 MR. NADAL: Yes, no, I'm aware of that argument.

12 I'd like to additionally move on and talk about how  
13 debtors cite the Supreme Court Freightliner Corp. v. Myrick  
14 for their implied conflict preemption argument. That's not a  
15 bankruptcy case. And as I'll discuss in a second, the Supreme  
16 Court treats bankruptcy case -- excuse me, Supreme Court  
17 treats preemption differently in bankruptcy. Even if it were  
18 a bankruptcy case, Freightliner wouldn't help them because the  
19 Supreme Court goes on to say that they find conflict  
20 preemption where it is impossible for a private party to  
21 comply with both state and federal requirements or where state  
22 law stands as an obstacle to the accomplishment and execution  
23 of the full purposes and objectives of Congress.

24 We already know that that second one doesn't apply in  
25 the Eighth Circuit, but neither of them are present here.

Colloquy

1 Debtors have never said it is impossible to get California  
2 consumers' consent. They just don't want to. They don't want  
3 to for the reasons that Mr. Cate articulates and testify to.  
4 It costs more to get opt in consent. You get less people.

5 Now, I want to turn to that in bankruptcy courts --  
6 excuse me, in bankruptcy cases, courts, including the Supreme  
7 Court, regularly adopt a more restrained approach to  
8 preemption. The Third Circuit Integrated Solutions case we  
9 cited in our initial objection explains that the Supreme Court  
10 law has attempted -- its strangely written. Supreme Court law  
11 attempting to balance federal and state law in the bankruptcy  
12 context has generally taken a similarly restrained approach to  
13 federal preemption.

14 This is still a good law, and I admit it's from the  
15 Third Circuit. And that's why I'm going to talk about how it  
16 is based on the recognition that when it comes to bankruptcy,  
17 things are a little different. That's something that we all  
18 agree on. Congress has the authority under Article I to pass  
19 uniform laws of bankruptcy, and Congress has historically and  
20 consistently chosen to allow applicable nonbankruptcy law to  
21 define the nature, scope, and extent of property rights once  
22 they come into the bankruptcy estate. That's *Butner v. United*  
23 *States*. It's also the more recent *Mission Products Holdings*  
24 *v. Tempnology* case, which we cited in our objections.

25 Debtors fail to grapple with the Supreme Court's

Colloquy

1 recitation of the general Bankruptcy Rule that the estate does  
2 not possess more than what the debtor did outside bankruptcy.  
3 Laws that apply outside bankruptcy apply inside it as well.

4 And it's getting late, but I'd like to take a brief  
5 history detour here. In Mission Products, the Supreme Court  
6 traced this general Bankruptcy Rule to a 1924 Bankruptcy Act  
7 case, Board of Trade of Chicago v. Johnson. That's 264 U.S. 1  
8 (1924). I'm not going to talk about the facts of that case --

9 THE COURT: I'm familiar with it.

10 MR. NADAL: -- not because they're bad for me, but  
11 because Chief Justice Taft in that case traces the rule back  
12 even farther to the 1876 case, Hyde v. Woods. Chief Justice  
13 Taft's description of Hyde v. Woods is at pincite 8 through  
14 10, and he describes about how the bankrupt in that case was a  
15 member of the San Francisco Stock and Exchange Board,  
16 voluntary association, and there's a right in each member to  
17 sell their seat, subject to an election of the directors of  
18 the vendee as a member.

19 Chief Justice Taft describes, "This court held that  
20 the membership to be an incorporeal right and property which  
21 passes to the trustee of the bankrupt, subject to the rules of  
22 the Board", which required first the payment of all debts due  
23 to the members. It might be a little different nowadays, but  
24 nearly 150 years ago, the Supreme Court held that a bankruptcy  
25 estate's ability to sell property was limited by contractual

Colloquy

1 restrictions enforceable under California law.

2 Today, 23andMe wants to ignore California, and that's  
3 wrong.

4 THE COURT: And Nadal, let me ask you about  
5 363(d)(1). Trustee may use sell or lease property under  
6 subsection (b) or (c) in the case of a debtor that is a  
7 corporation or trust that is not a moneyed business,  
8 commercial corporation, or trust only in accordance with  
9 nonbankruptcy law applicable to the transfer of property by a  
10 debtor that is such a corporation or trust. That is a clear,  
11 unequivocal statement that nonbankruptcy law applies --

12 MR. NADAL: Yes, Your Honor.

13 THE COURT: -- but not to this debtor. To  
14 nonprofits.

15 MR. NADAL: Your Honor, can --

16 THE COURT: Yes, please do.

17 MR. NADAL: -- I borrow the --

18 THE COURT: 363(d)(1).

19 MR. NADAL: Your Honor, this is a provision of the  
20 law that does say that -- yes, Your Honor. You're right. It  
21 says that.

22 THE COURT: So I mean, it's long been puzzling to me  
23 why Congress needed to say that if all nonbankruptcy law is  
24 enforceable in the context of 363? Why did they need to say  
25 that with respect to nonprofits?

Colloquy

1 MR. NADAL: I'm not sure. I haven't considered  
2 363(d)(1). But what I can say is that the text and structure  
3 of the Code supports this argument that I'm making. And I'd  
4 like to walk through, I know this is basic, but how property  
5 enters and leaves a bankruptcy estate because it's important.

6 When you file a Chapter 11 bankruptcy, it creates an  
7 estate under 541. We know from United States v. Whiting Pools  
8 that it sweeps broadly. And 541(c) expressly states that a  
9 debtor's interest in property becomes property of the estate,  
10 notwithstanding any provision in an agreement or applicable  
11 nonbankruptcy law that, (A), restriction or conditions  
12 transfer, or (B), is an ipso facto clause. That's 11 U.S.C.  
13 541(c).

14 But once property enters the estate, the ability the  
15 debtor to use or sell it is more limited. And that's because  
16 we know that debtors-in-possession can use 363(c) to use or  
17 sell estate property in the ordinary course or outside the  
18 ordinary course, as here in 363(b). And as Your Honor pointed  
19 out earlier, Section 363(l) further allows the debtor to use  
20 or sell estate property under 363(c) or (b), notwithstanding  
21 any ipso facto clause in the contract or applicable bankruptcy  
22 law. The notwithstanding clause in 363(l) is narrower than  
23 the notwithstanding clauses in Section 541(c). So  
24 restrictions that may have been ineffective to prevent the  
25 property from entering the estate still remain applicable with

Colloquy

1 respect to the trustee's use, sale, or lease of the property  
2 under 363.

3 Now, again, as I mentioned earlier and as we  
4 discussed, another way for property in a bankruptcy to deal  
5 with it is through a plan, and Congress includes preemption  
6 language there. Notwithstanding applicable law. Section  
7 1123(a) says, notwithstanding any otherwise applicable  
8 nonbankruptcy law, a plan shall do a variety of things. We  
9 cite in our objection that that includes plan may allow for  
10 transfer of property to an entity created either pre or post-  
11 petition. And then 1123(b) says, subject to 1123(a), looping  
12 in the notwithstanding language, a plan can propose to sell a  
13 state property free and clear of liens.

14 None of this language exists in Section 363(b)(1).  
15 And as we just discussed, you don't even have to look far to  
16 find true preemption language in 363. It's in 363(1). I'll  
17 even concede that it's in 363(g), where Congress expressly  
18 says that a debtor can sell free and clear of dower or curtesy  
19 interests.

20 And I'd even accept a more direct preemption  
21 argument, which they're making, which is that the Bankruptcy  
22 Code preempts state insolvency laws that directly conflict  
23 with the Code. And that's State of Missouri v. U.S.  
24 Bankruptcy Court for the Eastern District of Arkansas, 647  
25 F.2d 768. It's an Eighth Circuit case from 1981.

Colloquy

1 Respectfully, I believe that's a better case than the debtors'  
2 Heart of America Grain case for direct conflict preemption  
3 because it deals with bankruptcy.

4 What debtors are doing is treating 363(b)(1) as a  
5 preemption statute. What they're trying to do is transform  
6 363(b)(1)(A) into either Section 1123 or 1123(b)(4) without,  
7 again, as we discussed earlier, complying with the  
8 requirements of a plan.

9 I want to -- that was a lot of bankruptcy stuff, and  
10 I want to talk about California law and how it interplays  
11 here. California law is an applicable state law that  
12 restricts transfer of property. When 23andMe filed  
13 bankruptcy, I'll concede that 541(c) says that that  
14 restriction on transfer doesn't stop it from entering the  
15 estate. But now that the debtor-in-possession has these  
16 things, they have to do something with them.

17 We know, based on Supreme Court and Eighth Circuit,  
18 that debtors can't use 363(b) to sell in a way that  
19 contravenes applicable state law. Of course, if California's  
20 Genetic Information Privacy -- sorry, GIPA imposed a monetary  
21 restriction that would likely be preempted because of 363(l)  
22 if it was an ipso facto law.

23 Now, I'd be remiss if I didn't address debtors' and  
24 others' argument that if you don't approve this, we're going  
25 to convert to Chapter 7, the DIP lender will foreclose, and so

Colloquy

1 on. First, California law is clear. GIPA follows the data.  
2 Follows the biological samples. If it goes to Chapter 7,  
3 still subject to GIPA. If it goes to the DIP lender, still  
4 subject to GIPA.

5 Second, this would be a problem of debtors' and TAM's  
6 own making. You heard consistent testimonies that debtors did  
7 not market this without the California data. That debtors did  
8 not market this with the condition that California consumers  
9 provide separate and express consent. Debtors did not market  
10 deidentified California consumer data. Debtors didn't try to  
11 substantively comply with California law.

12 And I want to turn this argument around and pick up  
13 on a statement that Your Honor made. Debtors were marketing  
14 an illegal transaction. The debtor-in-possession comes into  
15 possession of illegal drugs with a street value of one-billion  
16 dollars, you can't sell that in bankruptcy. We have the same  
17 issue when it comes to cannabis-related businesses that can't  
18 get bankruptcy relief as well.

19 But this leads to a finer point, which is that  
20 debtors' business judgment in this case is wrong. A sale of  
21 assets that violates applicable California law is more than  
22 just illegal. It also opens the estate to liability through  
23 an administrative claim that would be superior to the  
24 professionals. This is a point that Mr. Lefkowitz -- not the  
25 priority claim, but Mr. Lefkowitz admitted that there are



Colloquy

1 serious penalties that apply. For the 1.8-million California  
2 residents, penalties for each violation would only need to be  
3 170 dollars each to absorb the entire 305-million dollar  
4 amount.

5 In addition, despite TTAM's principal's testimony  
6 that she didn't negotiate a deal that provided separate  
7 express consent, you saw just this morning that TTAM agreed  
8 with the State of Alaska to get the opt in consent for  
9 residents of the State of Alaska.

10 In addition, you heard Mr. Cate testify that you can  
11 get opt ins. It just costs money. GIPA has a deidentified  
12 data exception. Debtor doesn't want that. TTAM doesn't want  
13 that. TTAM's principal's testimony was that she didn't want  
14 deidentified data only, even though the research arm of TTAM  
15 can proceed with deidentified data. They could also let  
16 California consumers opt in.

17 Now, TTAM's principal testified on direct that there  
18 are people who are really concerned about the data being  
19 deleted. Those people can opt in. To the extent those people  
20 are really concerned about the data of 1.8 million California  
21 consumers being deleted, those people don't get to decide for  
22 Californians.

23 Finally, or third, I'd like to turn to the Title 28  
24 U.S.C. Section 959 argument. Federal nonbankruptcy law  
25 requires, and here I'm going to go a little farther, a

Colloquy

1 trustee, receiver, or manager appointed in any cause pending  
2 in any court of the United States, including a debtor-in-  
3 possession, to, as they state, comply with applicable state  
4 law. The actual language of that statute is old fashioned,  
5 but that's because it's an old statute.

6 I want to jump back to 1931, when the District Court  
7 for the Southern District of California, likely based out of  
8 my hometown of San Diego, appointed a receiver over a gasoline  
9 company. California state law made it unlawful to distribute  
10 motor fuel without license, bond, or paying taxes. For two  
11 years, everything proceeded fine, but then the receiver lost  
12 his bond. He asked the district court for permission to  
13 operate without a bond or license, or there would be final  
14 liquidation and material loss to all concerned.

15 Perhaps surprising no one in this room, the  
16 California Attorney General objected. The district court  
17 granted the request. My office appealed to the Ninth Circuit.  
18 It reversed, based on the text of what is now 28 U.S.C. 959.  
19 The case went to the Supreme Court, which agreed with the  
20 Ninth Circuit. That's *Gillis v. California*, 293 U.S. 62, from  
21 1934.

22 The Supreme Court framed the ultimate issue as  
23 whether Congress could withhold from district courts the power  
24 to let receivers transact business contrary to state law.  
25 Congress could do that, but it chose not to because of 28

Colloquy

1 U.S.C. 959. Again, a hundred years ago, the Supreme Court  
2 vindicated California law. That same statute applies to  
3 debtors.

4 And I'm going to bring this back to the structure of  
5 the Bankruptcy Code because there's one more Supreme Court  
6 case, which is *Midlantic National Bank v. New Jersey*  
7 *Department of Environmental Protection*, 474 U.S. 494, from  
8 1986. There, the Supreme Court held that a trustee can't use  
9 Section 544(a) to abandon property the estate in a way that  
10 violates state and federal environmental law. In that case,  
11 the Supreme Court says that Title 28 U.S.C. 959(b) provides  
12 additional evidence that Congress did not intend for the  
13 Bankruptcy Code to preempt all state laws. That's another way  
14 you can get property out of the estate. Abandonment. You  
15 can't abandon property in contravention of state law.

16 In sum, 363(b) isn't a preemption statute. If  
17 debtors want to use 363 to move property out of the bankruptcy  
18 estate, they have to comply with applicable state law  
19 restrictions on transfer. California does not have the burden  
20 here. Debtors' burden shifting argument is premised on  
21 363(b)(1)(B), which I'll turn to next, but it looks like you  
22 have a question.

23 THE COURT: I do not have a question. Sorry.

24 MR. NADAL: Oh, that's all right. So even if  
25 363(b)(1)(A) applies as debtors want, the sale still fails.



Colloquy

1 Debtors' proposed sale is not consistent with the debtors'  
2 privacy policies for California consumers. Today, we walk  
3 through 23andMe's California privacy statements. From January  
4 1st, 2020 through December 13th, 2022, 23andMe said that they  
5 do not sell California's consumers' personal information.  
6 Full stop. Rest assured.

7 We know that in March 2022, debtor had 11.8 million  
8 customers. Some of those were California residents. They got  
9 this rest assured policy twice, as Mr. Lefkowitz explained.  
10 They twice confirmed their agreement to it. We also have  
11 numbers from the CPO report, which says that -- I'll  
12 summarize, but eighteen-million customers. On June 9th, 2025,  
13 nearly one third of those customers have not logged in in the  
14 last three years. That takes us back to the December 13th,  
15 2022 policy. That's the rest assured policy. We also know  
16 that debtors track this information. They could have put on  
17 evidence about this. They didn't.

18 And then from December 14th, 2022 to the present,  
19 23andMe promised that it would provide notice and an opt out  
20 right. After all this time and reworking of the transaction  
21 structure, the sale order and TTAM's exhibit D, whatever  
22 its -- the last version I saw does not do this. Debtors and  
23 TTAM haven't even put in that California residents get notice  
24 of the opt out rights that debtors required consumers to twice  
25 acknowledge. That's not quite wrong, but it shows something.

Colloquy

1 Maybe an -- well, I'll pause there.

2 I'm sure that between the time I just said this and  
3 when I sit down in a couple minutes, debtors and TTAM can push  
4 out a new version of their agreement that says you have a  
5 right to opt out. If that was all it took, we wouldn't be  
6 here because in a sense, the State of California, it doesn't  
7 matter what debtors' privacy policy says. And that's because  
8 of the company's privacy policy violates applicable state law.  
9 It is illegal and void as against public policy.

10 Debtors' 363(b)(1) argument creates perverse and  
11 improper incentives, and this Court should not endorse it. If  
12 debtors' argument is correct, two minutes before filing a  
13 bankruptcy petition, any company can reissue a privacy policy  
14 to say that the company can do whatever it wants with the  
15 person's most sensitive and private data. Now, that didn't  
16 happen here, but their interpretation allows it to. And  
17 that's an absurd result.

18 I appreciate Mr. Cate's commitment to this point, but  
19 I think I can also salvage the potential inconsistency there.  
20 In normal circumstances, Mr. Cate views privacy policies as  
21 contracts. But then once the legislature acts, it's the law.  
22 It becomes something more than just a contract. Companies  
23 have to comply.

24 Mr. Cate's position that if a company violates state  
25 law, the state Attorneys General can take action, but then

Colloquy

1 once they file bankruptcy, it's too late, that's an untenable  
2 position. I don't practice in the privacy arm at the  
3 California Attorney General's office, but I know that both  
4 TTAM and 23andMe have very good privacy lawyers. I'm pretty  
5 sure they don't want the state AGs to immediately jump to  
6 filing declaratory judgment lawsuits or lawsuits for violation  
7 of state policy the moment there's an issue spotted. Debtors'  
8 interpretation leads to that result.

9 In addition, it wouldn't even matter because even if  
10 the state AGs filed a lawsuit, two minutes before a company  
11 files bankruptcy, they can change the policy again, even if  
12 there's a consensual resolution of the privacy policy issues.  
13 Now, this is also more than just a legal argument. It's also  
14 a factual one. 23andMe did not intend for their privacy  
15 policies to violate state law. Mr. Lefkowitz said at  
16 paragraph 11 that the U.S. state privacy statements are  
17 designed to comply with laws specific to those jurisdictions.

18 TTAM's principal said they wanted privacy policies to  
19 comply with state law and their blog post that has trumpeted  
20 the passing of California's GIPA as if their policies complied  
21 with it because again, if your policies don't comply with the  
22 law, it can't enforce them, and you're subject to potential  
23 liability.

24 This brings me full circle back to the beginning.  
25 You've heard a lot about privacy from a lot of different

Colloquy

1 people. Mr. Cate has a view. Mr. Richards has a view.  
2 TTAM's principal has a view. But in this circumstance, GIPA  
3 applies. GIPA was passed by the elected California Senate.  
4 I'm sorry. Was introduced by the elected California Senate.  
5 Passed by the elected California Assembly. Signed by the  
6 elected governor. And now being enforced by the elected  
7 Attorney General's Office. Despite all that, GIPA doesn't put  
8 the issue to any of those individuals. GIPA puts the relevant  
9 question to the California consumer. The company wants to  
10 sell your sensitive and private information. They have to get  
11 your consent.

12 So really, it doesn't matter what TTAM's principal  
13 thinks. It doesn't matter what debtors think. It doesn't  
14 really matter what I think because California law puts that to  
15 the 40-million California consumers, or here, 1.8 million  
16 California consumers. Debtors propose to usurp that for the  
17 1.8 million California consumers. Why? Because it costs  
18 money to get their consent. They don't want to do that.

19 This is a 363 sale. GIPA applies. For the 1.8  
20 million consumers, debtor has to get their separate and  
21 express consent. Debtor could do this, but they refuse to do  
22 it. The People request that you deny the motion. I also  
23 available to answer any further questions.

24 THE COURT: Don't think I have any more. Thank you.

25 MR. NADAL: Thank you.



Colloquy

1 THE COURT: Texas.

2 MS. MILLIGAN: Thank you, Your Honor. Layla Milligan  
3 with the Texas Attorney General's office, appearing on behalf  
4 of the State of Texas.

5 I want to reset the conversation a little bit as far  
6 as Texas goes because as probably is not a surprise to anyone  
7 in this room, Texas, in my view, has quite a different special  
8 circumstance that is different from the other states and in my  
9 view, puts Texas in a different position because under Texas  
10 law, under the direct-to-genetic -- I'm sorry, Direct-to-  
11 Consumer Genetic Testing Act, which I'll call the DTC law,  
12 that law grants a specific -- I'm going to read it. I'm  
13 sorry.

14 503A.003 of the Business and Commerce Code -- of  
15 Texas Business and Commerce Code creates an exclusive property  
16 right in DNA and confidentiality of that information. And I'm  
17 reading the Code. "An individual has a property right in and  
18 retains the right to exercise exclusive control over the  
19 individual's biological sample that is provided to you were  
20 used by a direct-to-consumer genetic testing company, and the  
21 results, genetic testing or analysis, conducted on the  
22 individual's DNA by a direct-to-consumer genetic testing  
23 company, including to the collection, use, retention,  
24 maintenance, disclosure, or destruction of the sample or  
25 results. The results of the genetic testing of an



Colloquy

1 individual's DNA are confidential and may not be disclosed to  
2 another person without the individual's express consent."

3           The reason I think this part -- and I want to pause  
4 there because I want -- a direct-to-consumer genetic testing  
5 company is defined as an entity that offers genetic testing  
6 products or services directly to individuals as consumers of  
7 those products or services or collects, uses, and analyzes  
8 genetic data that results from a direct consumer genetic  
9 testing product or service. And that, in this case, is we  
10 would posit as 23andMe, Inc. That is the company that has  
11 been doing the direct genetic testing. It is not an umbrella  
12 of companies. It is the company, the entity, that is doing  
13 the direct-to-consumer genetic testing.

14           This is important because under 541, the property of  
15 the estate consists of the debtor's interest in property, and  
16 that interest in property retains any restrictions that may be  
17 applicable to that property under 541(c)(1)(A).

18           The debtor is saying we agree. We only own what we  
19 own. But that ownership that they're trying to transfer --  
20 that ability to transfer is limited to the data for  
21 individuals who give express consent. So that express consent  
22 is an additional requirement on that property aspect that the  
23 debtor is claiming. So under Texas law, that property is not  
24 property that can be sold by the debtor because it is property  
25 of Texas consumers as expressly indicated in the statute and

Colloquy

1 also comes with a restriction. I want to say --

2 THE COURT: And that's 003 you're talking about?

3 MS. MILLIGAN: 503A.003.

4 THE COURT: Okay. So if 003 on its own prevents  
5 transfer of the genetic material, why do we have 006 which  
6 talks about the transfer of disclosure of genetic data?

7 MS. MILLIGAN: Well --

8 THE COURT: Why do we need that?

9 MS. MILLIGAN: Thank you for asking that question.  
10 It is not banning the sale or transfer or disclosure of the  
11 asset. It is only upon the individual's express consent.

12 THE COURT: But why does the statute say that twice,  
13 effectively? Your interpretation of 003 is the same as 006 as  
14 I understand it.

15 MS. MILLIGAN: It's very similar. I think 003 gives  
16 the individuals a property interest in their genetic data very  
17 specifically.

18 THE COURT: But your argument is that property  
19 interest, the bundle of sticks that the consumer has, includes  
20 the right to prevent transfer. So what do we need 006 for?

21 MS. MILLIGAN: It requires -- I'm sorry. 503(A).006  
22 provides that this company must -- the DTC company engaging in  
23 the following activities must obtain separate express consent  
24 for the transfer or disclosure of the individual's genetic  
25 data to a person other than the company's vendors or service

Colloquy

1 providers. So it's not saying you can't sell it, it's saying  
2 you can sell it after you get the individual's express  
3 consent.

4 THE COURT: But you're arguing that 003 does the same  
5 thing all on its own, aren't you?

6 MS. MILLIGAN: I think they work in --

7 THE COURT: And I'm not being critical, but you  
8 brought up the property interest almost every time you're at  
9 the lectern. And it seems to me that your argument is that  
10 that's the showstopper, the property interest. The right to  
11 prevent transfer is inherent in the property interest.  
12 Nothing else matters. So what is 006 doing in the statute?

13 MS. MILLIGAN: 006, I think, provides the -- like, as  
14 I said, the last sentence of 003 says "without the  
15 individual's express consent". And then 503A.006 discusses  
16 the required consent. And so in that, it works together.  
17 503A.003 gives the exclusive property right and limits that  
18 property -- the transferability of that property right. It  
19 conditions it upon express consent. 503A.006, it discusses  
20 the required consent is what I would say. And it all works  
21 together.

22 THE COURT: But 006 seems to permit transfer to a  
23 vendor. Isn't that inconsistent with the property right in  
24 003 as you construe it?

25 MS. MILLIGAN: No, sir. And I will say that while a

Colloquy

1 vendor or service provider is defined in the Texas -- I'm  
2 going to say it wrong. The TDPSA, which is -- I will  
3 apologize, I have not looked at the Texas Data Protection.  
4 I'm sorry, my consumer privacy at --

5 THE COURT: The general privacy statute you're  
6 talking about?

7 MS. MILLIGAN: Yes. The general privacy statute.

8 THE COURT: Yes. Okay. I know the one you're  
9 talking about.

10 MS. MILLIGAN: Yes. That further defines -- I'm  
11 sorry, Your Honor, I completely lost track when I couldn't  
12 figure out what the TDPSA is.

13 THE COURT: Well, let me ask a related question. Why  
14 does 006 allow a transfer to a vendor without express consent?

15 MS. MILLIGAN: Yes. I'm sorry. Thank you for the  
16 reminder. A vendor or service provider is specifically  
17 defined in the Texas Data Privacy Security Act, TDPSA. And it  
18 is meant to allow the company to use the services of, like,  
19 Labcorp in this case, or another entity with which they have a  
20 specific contractual relationship with restrictions that are  
21 complied with under Texas law.

22 THE COURT: Okay. But the consumer doesn't have a  
23 relationship with Labcorp, for example.

24 MS. MILLIGAN: Yeah. The vendor has the contract  
25 with the direct-to-consumer genetic testing company.

Colloquy

1 THE COURT: So the Legislature has made a  
2 determination that that's the sort of thing that a consumer  
3 can't reasonably object to because it doesn't harm them.  
4 Disclosure to a vendor doesn't harm the consumer, right?

5 MS. MILLIGAN: The purpose of the vendor and the  
6 service provider is to facilitate the analysis of the genetic  
7 data. So in this case, I think 23andMe uses various research  
8 labs, things like that, that can do the service. It's not  
9 just sort of any vendor that has access to this. There are  
10 specific codified contract agreements that would be reached  
11 between the vendor or service provider and the direct-to-  
12 genetic testing.

13 THE COURT: Right. But the Legislature has said,  
14 consumer, you can't object to that. And the reason is that it  
15 doesn't harm them, right?

16 MS. MILLIGAN: I agree with that because the vendor  
17 and service provider is facilitating what the direct-to-  
18 consumer genetic company is doing.

19 THE COURT: Right. So if a direct-to-consumer  
20 company creates a subsidiary to house its data, how is that  
21 objectionable?

22 MS. MILLIGAN: Because the entity that is housing the  
23 data is changing. It is even -- if it is a subsidiary, we  
24 would argue that the actual company that does the direct-to-  
25 genetic testing in this case, again, 23andMe, Inc., would be

Colloquy

1 in violation of this statute if they transferred it to  
2 Lemonaid Health or another corporate entity of the debtor. So  
3 a subsidiary does not solve that issue because its control  
4 disclosure to an entity that is not the company.

5 THE COURT: But you would agree with me, wouldn't  
6 you, that there is less risk to the consumer from a transfer  
7 from parent company to subsidiary than a disclosure from  
8 parent company to third-party service provider, isn't there?

9 MS. MILLIGAN: I --

10 THE COURT: There's only one way to hack a  
11 corporate -- I'm going to oversimplify. There's one way to  
12 hack a corporate family. If you have data at Labcorp, Labcorp  
13 could get hacked. I hope nobody from Labcorp is listening.  
14 I'm not picking on Labcorp.

15 Labcorp can get hacked and 23andMe could get hacked.  
16 But the Legislature said under the circumstances, that's a  
17 risk that the consumer's got to take, right?

18 MS. MILLIGAN: I think because of my understanding,  
19 and albeit I'm a bankruptcy lawyer, not a privacy lawyer, but  
20 the restrictions and arguments between the vendor and the  
21 service provider -- I'm sorry, the DTC company and the service  
22 provider or vendor would control that relationship in any  
23 breach -- or any sort of security protocols would be a part of  
24 that underlying contract between there -- between those two.

25 But when you create a subsidiary and -- I plead -- I

Colloquy

1 want to be clear, I cannot substitute my opinion for the Texas  
2 Legislatures. They have passed this law and said a DTC  
3 genetic testing company can conduct its business with its  
4 vendors and service providers pursuant to the restrictions in  
5 the TDPSA or other Business and Commerce Code sections.

6 But the control of the DNA, the biological samples,  
7 the results, the information, the raw sequence of DNA has to  
8 stay with that company. And it can only be changed once the  
9 consumers have given their permission and express consent,  
10 which is a defined term.

11 THE COURT: So Ms. Milligan?

12 MS. MILLIGAN: Yes, sir.

13 THE COURT: Do you know whether in the last eighteen  
14 years, 23andMe has moved the data somewhere within its  
15 corporate structure?

16 MS. MILLIGAN: Unfortunately, I don't. And I think  
17 that the State of Texas -- I don't want to speak out of turn  
18 because it's a consumer protection issue -- but I think one of  
19 the issues leading up to where we are today was a lack of  
20 clarity as to which entity is the one doing the actual  
21 service, which is a problem -- a concern for Texas. It's my  
22 understanding that the majority of the information that we've  
23 received pre-bankruptcy was from 23andMe, Inc.

24 But in this case, in the debtor's schedules, it has  
25 been unclear really which entity has control of the genetic

Colloquy

1 data, who's doing the actual processing and work. And so  
2 that's why I say I believe it's 23andMe, Inc. is because  
3 that's the information and that's the entity that has been  
4 communicating with Texas prior to this bankruptcy case.

5 THE COURT: Okay. Let me ask you some of the  
6 questions I asked Mr. Nadal.

7 MS. MILLIGAN: Yes, sir.

8 THE COURT: The gist of your argument is that the  
9 debtors need to confirm a plan, liquidate or spend I don't  
10 know how much money trying to get consents and probably not  
11 get very many of them, at which point there is a real question  
12 whether TTAM has gotten the benefit of its bargain, whether  
13 it's getting what it's paid for. It's getting something, but  
14 would it have paid 305 million dollars for that? I doubt it.  
15 I can't say. So is confirming a plan better for Texas  
16 consumers?

17 MS. MILLIGAN: If I may, I don't know that that's all  
18 of our position. But I will say confirming a plan allows for  
19 the process under Chapter 11, 1129, and the plan to be  
20 proposed, disclosed consumers would have consent or they'd be  
21 able to vote if they have claims. They would have knowledge  
22 of what's going on. They would be able to participate in that  
23 plan process should they so choose. That's not what's  
24 happening here.

25 But I understand the cost that would be incurred.



Colloquy

1 But what I'm balancing here is we have a law that specifically  
2 lays out a Texas consumers property right. And if the  
3 debtor -- we have -- yeah, I think it's been suggested, like,  
4 Texas could be carved out. Texas could get express consent  
5 for their consumers.

6 The de-identified data, which as I understand is  
7 eighty percent of the data that TTAM is interested in, could  
8 be transferred because de-identified data is treated  
9 differently under our statute. It's the identified data -- or  
10 identifiable data that is restricted to express consent.

11 We saw the filing by Alaska indicating that they had  
12 a process with transferring research, consented transactions  
13 that is probably -- would be perfectly compliant with Texas  
14 law should the debtors and TTAM choose to proceed that way.

15 And I would note that what we've understood is Texas  
16 consumers compromise about 840 to 860,000 of the 13 million  
17 consumers of 23andMe. And so I'm not arguing necessarily that  
18 the sale is -- I mean, I have, as a bankruptcy attorney, have  
19 some issues with the sale that's being proposed. Setting that  
20 aside, if the Court is inclined to approve the sale, would --  
21 I think there are alternatives for the treatment of the Texas  
22 consumers that would be in compliance with the law. And --

23 THE COURT: But what power do I have to tell TTAM I'm  
24 going to change the deal and you've still got to pay 305?

25 MS. MILLIGAN: I think in their APA, they have a plan

Colloquy

1 toggle which is contemplated. They already have a plan toggle  
2 for Lemonaid Health. I don't think it's beyond --

3 THE COURT: But if we plan -- if we plan toggle,  
4 they're not going to seek consent from a soul in Texas.  
5 They're not going to do it because it's not required.

6 MS. MILLIGAN: I --

7 THE COURT: So what have we accomplished?

8 MS. MILLIGAN: In this process, the one that is  
9 before us today, the debtors are proposing under 363 to sell  
10 the data of Texas consumers that they own their data. And I'm  
11 not talking about the other assets. I'm not talking their --  
12 but their genetic identifiable data without their consent as  
13 provided under Texas law.

14 This is a law that was enacted after -- I believe,  
15 after the Ancestry.com situation. Because I think the  
16 Legislature considered the private genetic testing company  
17 sort of a gray area because it wasn't a healthcare provider  
18 necessarily, which has some exemption under our law.

19 And they wanted to reaffirm that Texans have a right  
20 in their genetic data and have control over their genetic  
21 data. This is a very as -- and I know that you know, this is  
22 a very specific case involving genetic data of individuals  
23 that they have voluntarily given for analysis, maybe ten --  
24 maybe twenty years ago.

25 But having that information, their genetic samples,



Colloquy

1 their bio samples, their saliva, their blood transferred,  
2 disclosed to a different entity than the one they contracted  
3 with under Texas law requires their consent.

4 So I am not saying that this is a situation where  
5 we're trying to completely undo the sale. I understand. We  
6 have consistently, from the beginning of this case, shared  
7 that this is Texas law and we believe it has to be enforced.  
8 The express consent is -- has been there since the beginning  
9 of this case. We've put it in our motion to appoint a CPO.  
10 We've had these discussions informally with the parties. We  
11 have said Texas is special in this way in that these folks  
12 have this property interest in this that is conditioned, and  
13 you cannot sell it in the way that you're proposing to sell  
14 it.

15 That sale transaction, I would say, has morphed over  
16 time. And it is -- I will add, it is a gray area because  
17 there was a bidding process. Regeneron was the winning  
18 bidder. There was a subsequent motion filed to reopen the  
19 bidding. And I think that motion was filed -- I'm sorry --  
20 June 6th was the order entered. June 10th was the objection  
21 to plan deadline for the parties who wanted to object. The  
22 revised APA was filed on a Friday the 13th. A plan toggle --  
23 or I'm sorry, the equity toggle was elected on Saturday the  
24 14th, and on June the 18th, four days later, we're here before  
25 Your Honor trying to approve this process.

Colloquy

1 And so the benefit of Texas consumers to having at  
2 least their data involved in a plan is that they would at  
3 least have notice of what's going on. And I would note that  
4 debtors do refer to their notice that they sent, that they  
5 filed on the docket that was sent on, I think, on June 11th.  
6 Started to be sent on June -- which was before the equity plan  
7 toggle also. It also says nothing about genetic data. The  
8 notice does not reflect genetic data in the terms anywhere  
9 therein. It's personal information.

10 So I would argue that while a plan would be costly,  
11 they have considered that there is going to be a plan for the  
12 Lemonaid Health aspect of this business. They have a plan  
13 toggle should Your Honor believe that the sale should not be  
14 approved. This is something they're contemplating. We  
15 certainly don't want to risk a transaction that is beneficial.  
16 But also we can't risk the Texas consumers who own this data  
17 and may not agree to have it transferred and opt out.

18 Deletion options, it is required under Texas law.  
19 That is not a concession. It's required. It's not a  
20 concession by TTAM. It's required under Texas law that  
21 individuals have opt out or data deletion rights.

22 But that's not what express consent is defined as  
23 under the Code. It is affirmative express consent. That  
24 could be by email. That could be done over time if TTAM were  
25 to isolate the material and not access it until that consent

Colloquy

1 is reached. There are ways to work around this process.

2 But on a basic level -- very high level, the value of  
3 the Texas consumers' property interest in their saliva, in  
4 their blood, in their test results, in their deceased father's  
5 information, in their future -- I have learned for the first  
6 time in being involved in this case, that people would use  
7 23andMe to identify parental -- like parents. So there is a  
8 lot at stake. Their children who have data out there.

9 This consent is innate in this legislative -- this  
10 law that was created and signed by elected officials. I don't  
11 know to what extent Your Honor would like for me to talk about  
12 363(b)(1)(A) or (b)(1). I do think that in this case, I --  
13 this is going to sound like a complaint, but this case, one,  
14 has moved very quickly, and I know bankruptcy does move  
15 quickly. And that's not to be unexpected. What is different  
16 in this case is that the transaction has changed pretty  
17 significantly from a straight up --

18 THE COURT: I disagree that that's different. That  
19 happens all the time.

20 MS. MILLIGAN: I think the nature --

21 THE COURT: It happens all the time.

22 MS. MILLIGAN: The nature of the equity structure is  
23 what is different, because I think initially Regeneron had won  
24 the bid and had a specific sale under 363. And then we  
25 switched to this equity structure, which does resolve the

Colloquy

1 TDPSA. But it doesn't resolve this element of the DTC Act.

2 But throughout this process, there has been a  
3 significant amount of gray as far as we have -- we have sought  
4 more information to confirm that the genetic data was even  
5 part of the sale. We saw it and asked to even just listen in  
6 to the auction to understand what was being bid on. It was  
7 not clear that the genetic data was part of the transaction  
8 because it was differently defined. And the information we  
9 got was very generic and very open.

10 But along with the gray area, in our view, is the  
11 privacy policies involved in this case, and the assurances  
12 that the debtors and their principals have made to consumers  
13 is wholly inconsistent.

14 I would even refer the Court to the statement that we  
15 admitted in earlier of Joe Selsavage to the House and the  
16 Senate, where he in -- this is his statement -- prepared  
17 statement submitted to the House and the Senate, not  
18 testimony. But even he says we follow strict security  
19 protocols and privacy principles, including explicit consent.  
20 We never share individual level data without the user's  
21 consent.

22 So I think that that -- and that was June 10th and  
23 June 11th. So I think there's inconsistency. I don't want to  
24 argue the DTPSA because that's not in our pleadings. But if a  
25 company is able to make representations that are wholly

Colloquy

1 inconsistent in their privacy policies and then ask this Court  
2 to only enforce the one paragraph at the end of the document,  
3 that works for them. I think that is very risky in a  
4 precedential way.

5 And specifically in the same way that my colleague  
6 from California indicated that a company could change their  
7 policy that they've represented to their consumer, their  
8 customers, very shortly before filing bankruptcy and then  
9 propose a sale that is violative of state law, or federal law  
10 for that matter, it's not something that I think is -- I think  
11 for public policy argument it's very concerning that a company  
12 would be allowed to modify its privacy policies to facilitate  
13 something that it couldn't do under state law.

14 And I don't believe the parties can contract around  
15 state law, can't bypass state law. There are different  
16 provisions in the Code that contemplate the consideration of  
17 non-bankruptcy law, and 363(b)(1)(B) does just that.

18 We have an appointed consumer privacy ombudsman. His  
19 report is in evidence. His concern was with the disclosure of  
20 data, disclosure of policies to consumers, what they really  
21 would understand. And coupling with the property interests  
22 that Texas consumers have, this is not something -- the  
23 concern is that this has become an exercise to adapt a sale  
24 that ultimately is -- I hear to an affiliate, not an  
25 affiliate, separate company, not a separate company. I think

Colloquy

1 this would just be --

2 THE COURT: All right.

3 MS. MILLIGAN: -- testified --

4 THE COURT: Each side can accuse the other of  
5 elevating form over substance, and parties are acting and  
6 reacting. But --

7 MS. MILLIGAN: Sure.

8 THE COURT: -- we're pushing our luck timing wise,  
9 Ms. Milligan.

10 MS. MILLIGAN: Okay.

11 THE COURT: Anything further you want to cover?

12 MS. MILLIGAN: Yes. I did want to add that we do  
13 believe -- we do object to the sale under 363(f). We don't  
14 believe it meets with the requirements of 363(f), and the free  
15 and clear -- Texas law doesn't permit the transaction as  
16 proposed as far as Texas consumers. And I'm not speaking to  
17 the rest of the state law, the Texas consumers have not  
18 affirmatively consented to the transaction. This is genetic  
19 data. It's not reducible to a lien. It's not a lien on this.  
20 They're not in dispute. And these folks cannot reduce their  
21 genetic data to a claim to be paid. And so we are concerned  
22 with the request.

23 And at a high level, the two-step process is  
24 ultimately a party -- an insider taking back control of her  
25 company, and it's been described as an affiliate, a change of



Colloquy

1 ownership. That's a restructuring process in a plan. It's a  
2 363 sale is a sale of assets. So I just want to be clear that  
3 we believe that there are troubling concerns with the sale,  
4 but if this Court is willing to approve the sale we would ask  
5 that the Court consider carving out the Texas assets, allowing  
6 the debtors to toggle that to a plan that's just the Texas  
7 identifiable genetic data. Potentially have similar treatment  
8 to what Alaska was afforded. And because there is a plan  
9 toggle, it's not an unreasonable ask. And it allows the  
10 debtor's transaction to complete, but also allows for a  
11 process for them to follow Texas law and respect the property  
12 interests and rights of Texas citizens.

13 So I think with that -- also, I'm sorry. I do think  
14 that my colleague from California referenced Henry Shower  
15 (ph.). I think that was the case that I mentioned earlier and  
16 another case involving a dairy farm, but I'm not sure that  
17 that dealt with genetic data, so I won't bother the Court with  
18 it.

19 THE COURT: Very good.

20 MS. MILLIGAN: That's all for now. Thank you, Your  
21 Honor.

22 THE COURT: All right. Thank you, Ms. Milligan.  
23 Other states in opposition?

24 MR. HUNT: Hi, Your Honor, I think I'm up next. If  
25 you'll allow me.



Colloquy

1 THE COURT: Yeah. Go ahead, Mr. Hunt. Yeah.

2 MR. HUNT: Unless Utah was like --

3 THE COURT: Go ahead, Mr. Hunt.

4 MR. HUNT: Oh, I'm sorry, I apologize. You're  
5 referring to folks in the courtroom. I --

6 THE COURT: Okay. We'll go to Tennessee next, all  
7 right?

8 MR. HUNT: A bad case of senioritis. So I would  
9 defer to my colleague from Tennessee.

10 THE COURT: All right. He's deferring to you.

11 MR. CLEMENTS: I appreciate that. Marvin Clements on  
12 behalf of the State of Tennessee. I think I've heard some of  
13 the Court's concerns here about why is the states -- why are  
14 the states coming in trying to undo this deal that has  
15 benefits for their residents and their citizens. And I want  
16 to assure the Court we're not coming in just as a wrecking  
17 ball, just for the sake of destroying the sale, and seeing  
18 what happens as a result of that.

19 There's important principles of state sovereignty at  
20 issue for the states to be able to pass their own laws and  
21 have them be enforceable with the understanding that there is  
22 the principle of federalism with the Supremacy Clause. And if  
23 the federal law does override state law, then it has to give  
24 way to that. But where it doesn't, the states have the  
25 ability to expect their laws to be complied with. And that's

Colloquy

1 what we're seeking here.

2 We're not seeking even to destroy the sale or stop  
3 the sale wholesale. We're just seeking to have it done in a  
4 way that's compliant with Tennessee's TIPA law. And  
5 particularly with the part that requires the separate express  
6 consent or an opt-in for the -- when a direct genetic testing  
7 company transfers, or uses, or discloses information to an  
8 entity other than -- or a person rather other than service  
9 providers or vendors. And that's not what we have here.

10 So we're clearly of the position that this is a sale  
11 to which the GIPA does apply. There is no third-party  
12 requirement. I mean, some of the statutes have said that if  
13 you -- it's to a third-party, you have to get the separate  
14 express consent. That's not Tennessee statute. It's just to  
15 any person, which is also defined as individual corporation,  
16 business partnership, limited liability company, or other  
17 business entity.

18 And if it is going to be a transfer or disclosure to  
19 one of those types of persons separate express consent of the  
20 of the consumers whose data is being disclosed or transferred  
21 have the under the GIPA to receive prominent, clear,  
22 meaningful notice of the sale transaction.

23 And I think it's -- this case, kind of, to me -- or  
24 to the State shows why that's so important. Because here  
25 there is this complicated transaction that's being done with

Colloquy

1 creating a NewCo, transferring all the assets to that, then  
2 using an equity sale to have those -- that control of that  
3 wholly owned subsidiary go to a new purchaser, TTAM in this  
4 case.

5 And here if they said -- I think there's been a lot  
6 of testimony about people signed up for property being able to  
7 be sold during their -- during the case of a bankruptcy. But  
8 it's inconceivable that consumers would think my data is going  
9 to be sold from the company I signed up with, through this  
10 complicated process, to the same person that caused the data  
11 breaches in this -- or was running the company when the data  
12 breaches in this case happened. That had the company that  
13 ended up going into bankruptcy.

14 And while the consumers could say, we did contract  
15 with her before, we trusted the judgment of 23andMe and the  
16 principles that stood for and the policies that it had, and we  
17 do -- we want to continue on through this new transaction.  
18 But that's why it's so important to let the consumers be the  
19 ones that have that separate express consent.

20 THE COURT: So Mr. Clements, I certainly understand  
21 your point about state sovereignty and that sort of thing. As  
22 you probably have guessed, what I'm struggling with is the  
23 idea that your legislature has not regulated ownership of a  
24 direct-to-consumer company.

25 MR. CLEMENTS: That's correct.

Colloquy

1 THE COURT: And the debtors can change ownership to  
2 not only Ms. Wojcicki, but pretty much anybody else they want  
3 to without violating state law if they do it in a certain  
4 form. And so what principle are we really establishing here?

5 MR. CLEMENTS: I think we're giving way to the  
6 Supremacy Clause of the Bankruptcy Code. And if there's a  
7 plan mechanism set out in the Code that's going to allow that  
8 kind of a transfer to happen through an equity resolution --  
9 through a plan, then the states recognize supremacy. I mean,  
10 we don't --

11 THE COURT: But this is the same issue -- same  
12 discussion I had with Mr. Nadal. It doesn't even need to go  
13 there because your state statute doesn't have anything to say  
14 about a recapitalization of this company with new  
15 stockholders.

16 MR. CLEMENTS: Right. But it does about this  
17 transfer to this this NewCo.

18 THE COURT: Right. So I mean, I -- and don't take  
19 this the wrong way. This is a spirited discussion.

20 MR. CLEMENTS: Yes, sir.

21 THE COURT: It seems to me that what you're saying is  
22 that the debtors can do what they want to do, as long as  
23 they're willing to spend 15 million dollars to get from here  
24 to there. I mean, isn't that what it comes down to? I'm not  
25 sure that number is right, but it's --

Colloquy

1 MR. CLEMENTS: Yeah. I mean, I think that what it  
2 comes down to is there is a mechanism in place that was put in  
3 place by Congress to go through the plan process where the  
4 states recognize that there is that process. Outside of that  
5 process, to come in and say, well, we're going to do this with  
6 a different process and your laws don't apply.

7 We submit that they do, that they're not preempted,  
8 and that once we've gotten to the consumer privacy ombudsman,  
9 we're asking that all the circumstances of the case be looked  
10 at and then find that there's not going to be a violation of  
11 our rightly passed laws.

12 THE COURT: Well, let me take it out of the  
13 bankruptcy plan context. I mean, as I understand it, the  
14 debtor's securities are traded on the pink sheets now.

15 MR. CLEMENTS: I'm sorry. Say that again, please?

16 THE COURT: As I understand, the debtor's equity  
17 securities are trading on pink sheets now. So Ms. Wojcicki,  
18 at 9:30 Eastern time tomorrow, can sell her twenty percent  
19 interest -- or forty-nine percent interest in this company to  
20 anybody she wants. And Mr. Viscito, I don't know how much he  
21 owns, but let's say he owns at least two percent, and he  
22 could -- the two of them could sell majority control of this  
23 company to anybody they want. And Tennessee law, and the laws  
24 of these other states, don't have anything to say about that,  
25 right?

Colloquy

1 MR. CLEMENTS: I think that's the case. And that's  
2 a -- that's something that the Legislature is going to have to  
3 exercise its sovereign responsibility and come up with a way  
4 to address that, or if they choose to have that as the way  
5 that these transactions get done, then they can leave it as it  
6 is.

7 THE COURT: Okay.

8 MR. CLEMENTS: So I mean, I don't think it's  
9 necessary for me to go through and talk about all the --  
10 sorry, I just lost my train of thought.

11 THE COURT: That's okay. That's all right.

12 MR. CLEMENTS: I'll keep going on that. So I think  
13 that what we're saying is if they're going to do the  
14 preemption of the state law, you have to go consider several  
15 issues and questions that -- it's in my case, I cited in my  
16 brief, Sears.

17 And these questions are we going to look and see is  
18 the state law explicitly preempted by federal law? And I  
19 don't think the genetic data is explicitly preempted by the  
20 federal law here. Is the state law implicitly presented  
21 because Congress has regulated the entire field and it has  
22 not.

23 Is the state law implicitly preempted because  
24 compliance by a private party with federal and state law is  
25 impossible? Again, it may be more expensive. It may be more

Colloquy

1 time consuming. It may require that they look to do it in a  
2 different way that has been around for such a long time that  
3 it's a known way of doing this. But facts of expedience or  
4 saving money, that's not a basis for preempting rightfully  
5 enacted state law.

6 And then the fourth is, is it implicitly preempted  
7 because it creates an obstacle to accomplishment of the  
8 execution of the full purpose of the federal law. And we  
9 would argue that it's not because the federal law recognizes  
10 there's going to be swings and sways, pluses and minuses, and  
11 we're still going to have people coming into bankruptcy,  
12 seeking to reorganize and get the value for the estate, still  
13 recognizing the comedies of sovereign states and other  
14 lawfully acted -- enacted rights.

15 I just wanted to take a just a brief minute. I think  
16 I already talked about it a little bit, about that why the  
17 state law applies. Tennessee has also enacted a TIPA, a  
18 Tennessee Information Protection Act. And in that act, the  
19 Legislature specifically made provisions for opt outs. They  
20 also specifically made provisions for treatment of affiliates.  
21 And so we -- they knew how to create these exceptions for  
22 affiliates.

23 They didn't in the GIPA. They talked about  
24 affiliates in dealing with hospitals and affiliated entities  
25 or academic medical research organizations and their



Colloquy

1 affiliated entities. But again, it did not go so far as to  
2 make a carve-out for compliance with separate consent for  
3 affiliates. It's strictly just vendors and service providers.

4 And I think Your Honor was asking some questions  
5 about that earlier. And that's one of those prerogatives  
6 where it makes sense for a company to be able to contract and  
7 hire people to do the services that people came to the debtor  
8 to have done with their -- test their data, process it. And  
9 there's all -- there's that -- that's an acceptable carve-out  
10 for the legislature to do as opposed to create -- allowing  
11 this transfer to some different entity that then can sell its  
12 equity.

13 I think that was all that I really needed to say. I  
14 would also rely on my brief.

15 THE COURT: Sure.

16 MR. CLEMENTS: And if the Court has any other  
17 questions, I'd be happy to try to answer them to the extent I  
18 have.

19 THE COURT: I don't think I have any more. Thank  
20 you.

21 MR. CLEMENTS: All right. Thank you.

22 THE COURT: All right. Mr. Hunt.

23 MR. HUNT: Thank you, Your Honor. At the risk of  
24 being -- I mean, looking at this the wrong -- or taking this  
25 the wrong way, I just wanted to say I appreciate your

Colloquy

1 bandwidth, your ability to absorb all of the information that  
2 we've had today, so. And I know the hour's late, so I will be  
3 brief.

4 I think I already mentioned this earlier, and it's in  
5 my brief, so I'll just say that Kentucky statute -- and I will  
6 bypass the other detailed bankruptcy specific arguments  
7 here -- I will commend those to your judgment and the  
8 arguments you've already heard.

9 But Kentucky Revised Statute 311.705 clearly requires  
10 separate express consent before there is a transfer. We had a  
11 lot of discussion about the nature of the transaction and so  
12 forth. Our position is quite simply that those constitute  
13 whatever form that happens to take. It's been discussed that  
14 constitutes a transfer.

15 And I'll address that with my second part that I  
16 thought I would take a different tack with this a little bit,  
17 which is I wanted to mention -- or highlight for the Court a  
18 number of things that have been presented Wednesday and today  
19 that I think should inform your decision that you would find  
20 helpful.

21 The first set can be found in Ms. Wojcicki's  
22 declaration. If we're considering whether this is a transfer,  
23 whether we're talking about an affiliate or not, all of those  
24 issues -- in paragraph 8 of her declaration, she notes that  
25 TTAM did not exist before the petition was filed. And also in

Colloquy

1 that paragraph she states, "TTAM is not and was never  
2 affiliated with the debtors." She goes on to say that TTAM  
3 has never been associated with the debtors, and she reiterates  
4 those claims in paragraphs 10 and 11.

5 So part of the reason that I questioned her in the  
6 manner I did is an attempt to sort of ascertain what the  
7 length and breadth and depth of that actually involved. In  
8 that conversation with her -- so now I'm referring to her  
9 testimony on Wednesday -- I would submit to the Court that Ms.  
10 Wojcicki either could not or struggled mightily in answering  
11 some pretty basic questions about how TTAM would operate.

12 I'll stop here and say in our reading of this, we're  
13 not so much interested in the NewCo aspect of this step.  
14 Because as we understand the transaction, it will ultimately  
15 be TTAM that is in control of these -- of the equity of these  
16 assets.

17 So that led me to exploring with her what that would  
18 look like and what that governance structure would be. And  
19 she could not, as I saw it, accurately describe how TTAM  
20 operates. She couldn't tell me whether the decision for TPM  
21 to bid on these assets came solely as her decision, or if it  
22 came as a vote of the board of directors and -- or what that  
23 vote was. And it seemed there was just no -- there was no  
24 detail that I would have expected to be a pretty easy question  
25 to answer quite frankly.

Colloquy

1           She indicated, which I found curious, that she has no  
2   control over authority of this data and would not if the sale  
3   went through, which left me perplexed, because if TTAM is the  
4   one that's in control and they have -- they own NewCo, NewCo  
5   is made up, essentially, as I understand it, of somebody that  
6   was a -- somebody or somebodies who were appointed by 23andMe  
7   or the debtors collectively.

8           So there were a series of those questions where I was  
9   trying to ascertain what that would look like and how  
10   decisions would be made and who would be ultimately  
11   responsible for ensuring compliance with privacy policies and  
12   a number -- all the other things that come with running a  
13   business. And she did indicate while TTAM is a nonprofit, she  
14   did indicate that they would -- as I understood it, that they  
15   would run the business as it had been run before, so as a  
16   going commercial enterprise in addition to whatever its  
17   research mission ended up being.

18           So from our perspective, I would suggest that it's a  
19   business. And it's a separate business. It's not the same  
20   people that had control over 23andMe or the debtors  
21   collectively. She was part of that. But she was, as I  
22   understand it, a minority owner. There were other folks that  
23   could, if you will, act as a check on decisions that she may  
24   want to take or not take. And that doesn't seem to be the  
25   case -- that would not seem to be the case if the plan -- if

Colloquy

1 the sale goes through as proposed. And everything would seem  
2 to fall to her in that regard.

3 That's coupled with the fact that there was some  
4 testimony we heard today that I would submit is kind of  
5 troubling if they felt like there was really no restriction.  
6 They could enter into an agreement with a consumer, change  
7 that agreement unilaterally in any fashion they want. And  
8 that would be binding on not only the consumer, but as I -- if  
9 I understood Mr. Hopkins correctly, on anybody else, including  
10 states and conceivably this Court.

11 That doesn't strike me as the way -- certainly not  
12 the way it ought to be. And I don't think that's exactly the  
13 way it would operate in the end. Again, the question I would  
14 commend to your good judgment under the circumstances.

15 The next thing that I would like to point out is --  
16 if I can wax philosophical for just a moment -- is it occurs  
17 to me in thinking about this, that our society is engaged in a  
18 point in time that is not unusual. But it's one of those  
19 moments where technology is advancing in a way that our system  
20 of jurisprudence, our laws, a whole host of things, frankly,  
21 are just -- are not -- have not anticipated. And so we're all  
22 sort of feeling our way as to what is the what are  
23 best practices, trying to identify pitfalls and dangers and so  
24 forth. I would submit that the study, use, and manipulation  
25 of this genetic data, which is, again, profoundly sensitive

Colloquy

1 and important, is a serious challenge. And it crops up in a  
2 lot of different places because of its uniqueness to each one  
3 of us.

4 I would also suggest that, compared to other personal  
5 identifying information, PII, I think this is different, and I  
6 think it ought to be treated differently. It's more  
7 sensitive. It's more important. It's wholly deserving of an  
8 enhanced level of protection. And I think that's what a  
9 number of states have tried to recognize and address. And we  
10 can argue whether they've done it appropriately or fully or  
11 what have you. But I think that's why Kentucky has the  
12 statute that it has, along with a number of other states.

13 What's concerning to me beyond that is, when I  
14 questioned Ms. Wojcicki, she didn't seem to agree with that.  
15 She asserted that, for example, her bank account information,  
16 she considered more important and sensitive than her genetic  
17 information. Now, she, of course, is free to hold that  
18 position if she so chooses. But I would submit that she's  
19 wrong, because if her bank information is somehow compromised,  
20 it is possible for her to get a new bank account, to move her  
21 money if it hasn't all been taken. Or those accounts are  
22 insured in some way, so there are a number of protections.  
23 There's a way to come out on the other end hopefully not too  
24 damaged.

25 If this information, genetic data, is compromised,

Colloquy

1 the results could be far more lasting and severe and  
2 irreversible, and some of those in ways that we cannot fully  
3 anticipate because of what I had mentioned before. I think  
4 we're in an area scientifically that we're feeling our way.  
5 We just don't know what those are, and I think that can --  
6 that gives us an opportunity for great and terrible things.  
7 And so we need to tread lightly, which is part of the reason  
8 that I think that some of our states are pressing the way they  
9 are.

10 I'll also point out very quickly that -- the consumer  
11 privacy ombudsman's report has been discussed at length. I  
12 will not belabor this point. But if you review his findings  
13 on pages 7 -- roughly 7 through 10, he essentially indicates  
14 that separate affirmative consent would be the optimal path  
15 for dealing with this -- i.e., the path that provides the most  
16 protection and the most advisable way to proceed. He also  
17 states on page 10 that the path -- I would say the path that's  
18 proposed by the debtors -- is significantly -- provides  
19 significantly less protection in that regard. So I would ask  
20 the Court to take that into consideration when you consider  
21 this.

22 Winding down, I have one more point, which is I do  
23 not believe that obtaining this consent is the burden that has  
24 been asserted and almost sort of assumed. So I wanted to push  
25 back on that, and I want to refer to Ms. Wojcicki's testimony.

Colloquy

1 I asked her a number of questions about how 23andMe  
2 communicated. The answer -- and forgive me for a quick  
3 summary here, but it was essentially by email. I think it's  
4 already been discussed that email is pretty inexpensive and  
5 pretty easy. I think the debtors and TTAM have already  
6 proposed that they will send a communication to all of their  
7 customers. So they're already going to send that  
8 communication. So I don't think that they're doing anything  
9 extra that they couldn't include in that communication, which  
10 is obviously notifying these folks and asking and explaining  
11 why they would need to provide an affirmative response. And  
12 to be perfectly honest, I think, technologically, that is not  
13 a difficult hill to climb.

14 Added to that, when asked some additional questions,  
15 Ms. Wojcicki indicated that the response rates in the past to  
16 a number of these similar communications with 23andMe  
17 customers had yielded response rates somewhere in the eighty-  
18 to-eighty-five-percent range, which is a far cry from what the  
19 fear of, I think, Professor Cate and some others had indicated  
20 that it may be in the single digits or ten to twenty percent.  
21 I think, if you weigh what may be at best some measure of  
22 inconvenience to the debtors and to TTAM, weighed against the  
23 severity of these issues that we are grappling with and that  
24 this court will have to deal with, I think that's a small  
25 price to pay. I don't think it's unreasonable. I don't think



Colloquy

1 the debtors or TTAM have provided Your Honor with anything  
2 resembling evidence or persuasive evidence that this would be  
3 crippling to them, that somehow this would vastly undermine  
4 the value of the assets that we're talking about here.

5 So I think, absent that, I would ask the Court to not  
6 place -- not let that guide them too much in terms of whether  
7 they think that this will end the deal. I think they can do  
8 this notice, and I don't think that will blow up this deal,  
9 for lack of a better way of describing it. And that is not  
10 our -- that is not Kentucky's intent in objecting. We simply  
11 want to exonerate our statute and have it followed for all  
12 those reasons.

13 I also wanted to point out -- this had been mentioned  
14 a couple of places throughout today -- the additional privacy  
15 enhancements, so those that had been agreed to by some of the  
16 NAAG states and so forth. Some of us are here, and we're not  
17 in that group at this stage. So I just wanted to point out  
18 the fact that, for our part, Kentucky was engaged in  
19 discussions with TTAM. Now, I'm not Mr. Hopkins, so I don't  
20 know -- I can't profess to say whether TTAM and the debtors  
21 are sort of simpatico on this particular point or not. It  
22 seemed like they were, but I don't want to speak for them.  
23 But we were in the middle of those discussions on Wednesday,  
24 and that was abruptly shut down by TTAM's representatives.

25 But I bring that up not so much for the reason that

Colloquy

1 some folks might think, but to point out that now what has  
2 been filed in the record are these privacy enhancements that  
3 are explicitly for a select group of states, but not others.  
4 And that suggests to me, Your Honor -- and I suggest that you  
5 should view it that way -- that it is possible for them to --  
6 if this is the right use of the word, to bifurcate different  
7 groups based on states. So apparently, they are going to  
8 provide a certain level of privacy protection to -- I forget  
9 the number. I think it's twenty-two some-odd states. The  
10 rest, they are not going to provide those protections for, as  
11 we sit here now. So I bring it up solely to point out that if  
12 they -- it would seem disingenuous for them to somehow suggest  
13 that it is technologically impossible for them to make a  
14 distinction between those groups, and say, the citizens of  
15 Texas or California or the Commonwealth of Kentucky.

16 So with that, I've pretty much reached the end. I  
17 will just the debtors and TTAM chose to develop and  
18 purchase -- develop a company. And they entered a particular  
19 playing field, which is fifty states in our republic. They  
20 knew what they were getting involved in, and they knew what  
21 the rules of the game were when they started, which is they  
22 have to comply with these laws. They've indicated a  
23 willingness or desire to comply with them, except in this  
24 particular regard. So as I've indicated, I think it's a  
25 dubious proposition that it somehow would end the deal if they

Colloquy

1 had to comply with these particular statutes.

2 So again, commended to your good judgment whether  
3 there is a path forward with saving this sale. I'd like to  
4 think that there is, but regardless, like I said, I think they  
5 chose this. And they got into the business of dealing with  
6 this kind of data, and so there are some responsibilities and  
7 consequences that come with that. And they shouldn't be able  
8 to avoid those. I appreciate it; thank you, Your Honor.

9 THE COURT: All right. Thank you, Mr. Hunt.

10 Mr. Hopkins, yes.

11 MR. HOPKINS: Your Honor, if I may, and I don't want  
12 to interrupt Counsel from Utah.

13 THE COURT: Yes.

14 MR. HOPKINS: I just wanted -- we've gotten some  
15 inbounds from certain attorneys at various of the -- various  
16 stakeholders here that need to depart the courtroom for travel  
17 reasons.

18 THE COURT: Sure. Right, right.

19 MR. HOPKINS: We want to stay as long as Your Honor  
20 will have us and finish the hearing, but no one wanted to walk  
21 out without --

22 THE COURT: No, folks are free --

23 MR. HOPKINS: -- addressing the Court.

24 THE COURT: Folks are free to leave, of course.

25 Yeah, I mean, I think we're in a position to wrap this up this

Colloquy

1 evening, aren't we? Yes? Yes, later than some might have  
2 hoped, but.

3 MR. HOPKINS: That is a hundred percent the debtor's  
4 position, Your Honor.

5 THE COURT: Okay.

6 MR. HOPKINS: If the Court will accommodate us, we  
7 absolutely want to finish and need to finish today.

8 THE COURT: Yeah.

9 Are you all okay?

10 THE CLERK: Yeah.

11 THE COURT: You guys good? Okay. Okay.

12 Yeah, I think we should power forward, but anyone who  
13 needs to go, of course, that's fine.

14 MR. HOPKINS: Thank you, Your Honor.

15 MR. KIRPALANI: Not to make a big thing of it, Your  
16 Honor, but my eldest daughter is getting married this weekend.  
17 Otherwise, I would promise I would stay.

18 THE COURT: Oh, wow.

19 MR. KIRPALANI: But I have to make that flight.

20 THE COURT: Yes.

21 MR. KIRPALANI: I just have to make that flight.

22 THE COURT: Yes, absolutely.

23 MR. KIRPALANI: So thank you.

24 THE COURT: Do. Do that.

25 MR. KIRPALANI: Okay.

Colloquy

1 THE COURT: Do that. Thank you, Mr. Kirpalani.

2 MR. CLEMENTS: Your Honor, if I may.

3 THE COURT: Yes. Yes.

4 MR. CLEMENTS: May I make one more sentence on my  
5 argument?

6 THE COURT: I'm sorry, what?

7 MR. CLEMENTS: May I make one more sentence?

8 THE COURT: One more sentence? Okay.

9 MR. CLEMENTS: Yes.

10 THE COURT: I'll allow that. Okay.

11 MR. CLEMENTS: Thank you.

12 THE COURT: That's reasonable.

13 MR. CLEMENTS: In the event that Your Honor grants  
14 the sale motion, we ask that you do not waive Bankruptcy Rule  
15 6004(h) and 6006(d).

16 THE COURT: Got it. Okay. Thank you.  
17 Utah.

18 MR. NEDICK: Thank you, Your Honor. I'll be only a  
19 couple of minutes, hopefully, so not too bad. I'm Brett  
20 Nedick with the Utah Attorney General's Office, representing  
21 the State of Utah.

22 And so like other genetic privacy laws, Utah's, like  
23 other states, requires separate express consent for the  
24 transfer or disclosure of genetic data and additionally  
25 requires separate express consent prior to using the genetic

Colloquy

1 data beyond the primary purpose of the company's genetic  
2 testing product or service.

3 So on the transfer prong of our statute, I'm not sure  
4 how much more I have to add that has not yet been discussed or  
5 stated before this court. But our transfer provision creates  
6 no exception for the structure of the sale. This is a new  
7 organization with a new purpose. Our statute states that  
8 separate express consent is required for the transfer and  
9 disclosure of consumers' genetic data to any person other than  
10 the company's vendors or service providers.

11 And this has been discussed earlier on why that type  
12 of transfer should be allowed versus this potential transfer  
13 in this instant transaction, the difference being that the  
14 company's vendors and service providers are processors and not  
15 controllers. They're not making the decisions about the data.  
16 They're acting pursuant to the -- to 23andMe, or in a  
17 subsequent case, TTAM's directions. But TTAM is not a vendor  
18 nor a service provider, and thus, this meets the transfer  
19 prong of our statute and requires consumers' express consent.

20 THE COURT: Well, wait, Mr. Nedick. Step 2 of the  
21 transaction triggers your statute, or step 1?

22 MR. NEDICK: Either/or. Any transfer that --  
23 transfer or disclosure of the consumer's genetic data to any  
24 person other than the company's vendors or service providers.  
25 TTAM is not a vendor, nor is it a service provider. NewCo is

Colloquy

1 not a vendor, nor is it a service provider. So any way you  
2 slice it, this will require a consumer's express consent.

3 With regard to the primary-purpose prong, I just want  
4 to add that we think this is a clear case of the primary  
5 purpose being changed. 23andMe offered consumers a genetic  
6 testing product and service. Any research a consumer may have  
7 opted into was secondary. TTAM offers a substantively  
8 different service. As the primary purpose has changed, all  
9 Utah consumers should have the opportunity to opt in to that  
10 change. This is no longer about finding out where your  
11 ancestors are from or any genealogical work, but an  
12 organization dealing with genetic research.

13 THE COURT: Wait, wait. What in the record supports  
14 that assertion? You're the only one who's made that argument.  
15 And as I see the testimony, the business will be exactly the  
16 same, but under new ownership. What am I --

17 MR. NEDICK: TTAM has been advertised --

18 THE COURT: What am I -- what am I missing? Sorry.

19 MR. NEDICK: TTAM is advertised as a medical -- as a  
20 nonprofit medical research organization.

21 THE COURT: And if this transaction goes through, it  
22 will have a subsidiary that will probably buy the name 23andMe  
23 and will be named 23andMe and will do exactly what 23andMe  
24 does today, except as it may decide to do other things in the  
25 future, in which case Utah could weigh in at that point. Is

Colloquy

1 that not what the evidence shows?

2 MR. NEDICK: It is, but we do not have confirmation  
3 at this point in time with that.

4 THE COURT: You don't have -- we had Ms. Wojcicki, on  
5 the stand, say that under oath.

6 MR. NEDICK: Okay. Understood. Moving on is that  
7 there are a certain tranche of consumers that have opted in to  
8 medical research. I believe the split was eighty-twenty, that  
9 eighty percent specifically -- or that eighty percent did opt  
10 into medical research when signing up for 23andMe and twenty  
11 percent did not opt into this use. And again, I think that  
12 this is an argument that the primary purpose has lapsed and  
13 that these consumers require consent prior to their data being  
14 used.

15 THE COURT: I'm sorry. I don't follow that --

16 MR. NEDICK: The data in question --

17 THE COURT: I don't follow that argument at all. I  
18 do not understand what you're saying. The testimony is that  
19 this business will be run exactly the same way post-closing as  
20 it is today. What triggers the change-in-scope provision of  
21 your statute, again, please?

22 MR. NEDICK: That TTAM is advertised as a medical  
23 research organization, and as a nonprofit one. I think the  
24 business scope has changed.

25 THE COURT: So if -- take the bankruptcy out of the



Colloquy

1 picture -- 23andMe is out there in the world doing its own  
2 thing, and it is acquired, its stock is acquired in a go-  
3 private transaction by -- I'm going to use Procter & Gamble  
4 again. Does that mean that 23andMe has exceeded the scope of  
5 its business? It's a subsidiary now.

6 MR. NEDICK: Now, I would argue yes.

7 THE COURT: It's doing exactly the same thing.

8 MR. NEDICK: I would argue yes.

9 THE COURT: Okay. Well, I think you're alone among  
10 the attorneys general in making that argument, but I will note  
11 it. Thank you.

12 MR. NEDICK: Okay. (Indiscernible) is immutable and  
13 should be given the highest level of privacy protections for  
14 the consumers in question. A lot of this discussion has been  
15 centered around the value of this data and how it would impact  
16 the transaction or shareholders. We believe that this  
17 discussion should be centered around ensuring the proper  
18 protections for all consumers that initially engaged with  
19 23andMe. And this is to ensure express consent prior to  
20 transferring their data to TTAM or changing the purpose or use  
21 of this data. Thank you.

22 THE COURT: All right. Thank you, sir.

23 Rebuttal from the debtor, yes.

24 MR. NADAL: Thank you, Your Honor. My colleague, Mr.  
25 Eskandari is on the line for anything. I wish I could stay

Colloquy

1 here. Thank you for your courtesy this week.

2 THE COURT: Thank you for your spirited argument,  
3 sir.

4 MR. SANT: Your Honor?

5 THE COURT: Yes.

6 MR. SANT: Tal Sant again. Would it be possible to  
7 hear from one of my clients online on their arguments with  
8 respect to this transaction? I think it would be a lot  
9 briefer than if I address the Court, if we could have that --

10 THE COURT: I think you've -- I think we've already  
11 heard from you, Mr. Sant, and I've taken that under  
12 advisement.

13 MR. SANT: Okay. You've heard briefly. I think they  
14 had a -- they wanted to clarify a point or two, if that would  
15 be acceptable.

16 THE COURT: No, we're not going to do that.

17 MR. SANT: Okay.

18 THE COURT: Sorry, but your objection is under  
19 advisement.

20 Let's go to rebuttal from the debtor.

21 MR. HOPKINS: Thank you, Your Honor. Chris Hopkins  
22 of Paul Weiss, cocounsel to the debtors.

23 I'm going to be -- I'm going to try to do this as  
24 quickly as possible, but I think it's important to be  
25 thorough.

Colloquy

1 THE COURT: Yeah, don't rush. Don't rush through.

2 MR. HOPKINS: And our colleagues at the states made a  
3 lot of arguments.

4 THE COURT: Yeah.

5 MR. HOPKINS: As a threshold matter, there is a theme  
6 here that the debtors' pursuit of maximizing value for the  
7 benefit of our stakeholders makes us a villain. That is the  
8 debtors doing the job. That is the special committee doing  
9 the job. Debtors use tools that Congress provides them under  
10 the Bankruptcy Code for the benefit of their stakeholders,  
11 which includes 6.4 million customers who were subject to the  
12 2023 cyber-incident, among other folks.

13 I didn't hear any state say a plan doesn't work, to  
14 Your Honor's point, and I think that kind of hits home. It is  
15 not the outcome, it is not the outcome, that they're really  
16 focused on preventing. I candidly don't know what it is, on  
17 the facts of this case. But they say there are other  
18 mechanisms available under the -- other than what we're doing  
19 here. But 363(b)(1) is a mechanism provided under the Code.  
20 They allude to alternative transactions that -- because Texas  
21 or any of the other states wish, that TTAM will continue to  
22 stand behind an APA where we rep that we can transfer customer  
23 data to you without this opt-in consent construct, because  
24 that is our read of 363(b)(1) and the law. That is what we  
25 repped to. That is what TTAM agreed to. That is the -- that

Colloquy

1 is the business deal that underlines -- underlies the 305-  
2 million-dollar purchase price.

3 THE COURT: So let me ask a question carefully about  
4 that, and --

5 MR. HOPKINS: Sure.

6 THE COURT: -- answer carefully, as I'm sure you  
7 will. If I, as several of the AGs have suggested, were to  
8 require as a condition of the APA transaction, the equity  
9 drop-down transaction, that the debtors get express consent  
10 from the citizens of East Carolina, a moderately large state,  
11 can the debtors require TTAM to close the transaction with  
12 that condition imposed by me?

13 MR. HOPKINS: I'm going to give you a careful answer,  
14 and I'm going to refrain from wanting to ask you the question  
15 about how many people live in East Carolina.

16 THE COURT: Well, it's not as large as Texas, but  
17 it's maybe larger than Alaska.

18 MR. HOPKINS: Understood, Your Honor. I think, as  
19 the debtor, I would tell you that that's a litigation. I  
20 think TTAM could argue that it's a material breach of a rep.  
21 I think the debtors would exercise their fiduciary obligations  
22 to likely contest that obligation, or sorry, that assertion by  
23 TTAM. I'm not going to tell you on the record, under oath,  
24 that I would just roll over and say, that's an automatic  
25 termination, right, Your Honor, we're out of luck.

Colloquy

1 THE COURT: Right. You're not under oath.

2 MR. HOPKINS: Okay. Well, on the record, on the  
3 record. But it's a litigation, and let's --

4 THE COURT: Yeah.

5 MR. HOPKINS: I think it's -- I think it's worth  
6 saying what the consequences of that litigation are if TTAM  
7 makes that argument and it's right. The backup bidder  
8 certainly has no obligation -- if TTAM has a termination  
9 right, so does the backup bidder. At that point, we have a  
10 final proposal. Technically, we have a final proposal  
11 procedure order from Your Honor that says it's just TTAM and  
12 Regeneron.

13 Any risk to this transaction, that 305 million, it's  
14 not even as if TTAM, in theory, would say, I'll give you  
15 151,000,001 dollar so I'm just barely better than the backup  
16 bid. There is nothing. We're at square 1. We have a DIP  
17 outstanding. You've heard -- well, you've heard me say, and I  
18 think it is in the record because DIP budgets are on file,  
19 that full freight for this case, it's about twelve, fifteen  
20 million a month. So that's money out of cyber-breach claimant  
21 victims' pockets. It's money out of shareholders' pockets.

22 And so the short answer is, Your Honor, I don't know.  
23 I think it's a litigation. I think they could say, I get to  
24 renegotiate my whole deal because now I have a termination  
25 right. I think we would have a fiduciary obligation to

Colloquy

1 dispute that.

2 THE COURT: That's what I thought.

3 MR. HOPKINS: Thank you, Your Honor.

4 And so just to -- I'm, again, not going to rush, but  
5 I want to be efficient with everybody's time. So I want to  
6 start with preemption because I think it's important. We are  
7 not advocating a position that 363(b)(1) opens a floodgate of  
8 preemption that wholesale overrides state law. Only laws that  
9 restrict the transfer of PII, and only if the requirements of  
10 363(b)(1)(A) are met, do we submit that Congress, in BAPCPA  
11 through conflict preemption, preempts state transfer  
12 restrictions on PII. All other assets, all other types of  
13 assets, which are no -- there is no other enumerated type of  
14 asset in 363(b). I think you're in Shower.

15 But Congress has spoken about PII specifically. They  
16 put it in the statute. Now, it is narrow -- we think it is  
17 narrow conflict preemption. And we will acknowledge, as Your  
18 Honor deftly pointed out, there are other portions in the  
19 Code, or of the Bankruptcy Code, where Congress puts it right  
20 in the text, notwithstanding anything to the contrary under  
21 applicable nonbankruptcy law.

22 But -- and I mentioned the Supreme Court precedent  
23 before -- preemption is not just a textual analysis. It's  
24 text and structure. So the structure of 363(b)(1) is  
25 disjunctive. You have to give meaning to "or". It is either

Colloquy

1 the policy is -- the sale is consistent with the policy or  
2 based on -- after a CPO is appointed, based on the facts and  
3 circumstances, and no finding of -- there is no finding --

4 THE COURT: There's no showing.

5 MR. HOPKINS: -- no showing that -- been a long  
6 day -- that applicable nonbankruptcy law has not been  
7 violated. In our view, you cannot read that statute and read  
8 compliance with applicable nonbankruptcy law into 363(b)(1)(A)  
9 because it would obviate and essentially delete from the  
10 statute -- and we actually didn't get to it. But we had a  
11 nice little slide in our demonstrative about what 363 would  
12 look like if you accepted the state's view of the law. And  
13 it's effectively a whole bunch of deletions that says, doesn't  
14 matter what the policy says, doesn't matter if it's consistent  
15 with the policy, it has to satisfy 363(b) and applicable  
16 nonbankruptcy law. And Congress did not do that. And again,  
17 we think that, yes, Your Honor is obviously correct. There  
18 are examples in the Code where it's clear from the text, but  
19 Congress can use text or structure to indicate conflict  
20 preemption, and we believe that's what they did here.

21 I'm going to try to take in order arguments raised by  
22 various of the objecting states. And where I believe they  
23 apply to more than one state, I'm not going to repeat them  
24 each time.

25 Sub rosa plan, I agree with Your Honor. Sub rosa

Colloquy

1 plan is about, are you crystallizing distributions under the  
2 plan, are you doing things through a 363 sale that are  
3 typically the providence of a plan. The answer to both of  
4 those questions is no. We are -- no one raised a sub rosa  
5 plan objection when it was structured as an asset sale.  
6 Somehow getting to the same outcome transmutes the whole thing  
7 into a sub rosa plan when the revised form of the sale  
8 order -- which the states have seen, I believe, for a number  
9 of days now -- expressly has language in it that says, this  
10 does not affect anyone's rights with respect to the sale  
11 proceeds. All of that is preserved. It is the exact opposite  
12 of what a sub rosa plan does. All we're doing is bringing  
13 distributable proceeds that we need to confirm a plan into the  
14 estate. Otherwise, nothing is happening.

15 I believe it was the gentleman from California who  
16 said this cannot be a sound exercise of business judgment.  
17 Reject the premise. The special committee has done all the  
18 right things in getting the debtors to today. Obviously,  
19 you've have seen from our briefing, you've seen from our  
20 argument, we stand behind the conviction of our arguments and  
21 what we're permitted to do under 363(b)(1). And this is the  
22 way to maximize value. We marketed all of our assets. We ran  
23 a competitive auction process. It was very competitive.  
24 There was no unfairness.

25 You've heard a lot of aspersions cast towards TTAM





Colloquy

1 and Ms. Wojcicki [Wo-ji'-kee] -- Ms. [Wo-ji'-skee]. I  
2 committed my own sin. I was just talking to her earlier today  
3 about that. This is a case where the sale -- I'm not even  
4 sure, Your Honor, and I don't want to admit that it is a sale  
5 to an insider. Because I think you have to be very careful  
6 how you trace through the Code, and Ms. Wojcicki's equity  
7 ownership of the debtors has actually morphed over time in  
8 this case, because -- it's gone down, is the punchline.

9 But even if heightened scrutiny applied, let's look  
10 at the facts. It's a sale -- even if it is a sale to an  
11 insider, there's no release of estate claims. There's no  
12 purchase of estate claims against any insider of the debtors'.  
13 Personally, I've never seen that in a 363 sale involving an  
14 insider purchaser. Ms. Wojcicki voluntarily stepped away from  
15 the debtors with -- based on -- in discussions with the  
16 special committee. Coming into the filing, a broad delegation  
17 was approved by the board, granting all restructuring related  
18 governance authority to the special committee. Ms. Wojcicki  
19 kept her seat as a director of the board, as is her right as a  
20 significant shareholder. She had no involvement in the  
21 special committee, no involvement in any governance decisions  
22 post-petition, let alone anything related to the sale.

23 Your Honor is well aware that we ran a competitive  
24 bidding process, and TTAM did have a view about how that was  
25 run, to the extent she -- they can be deemed an insider, is

Colloquy

1 that it was run unfairly against them, against the insider. I  
2 think any accusation that this is a sweetheart deal, trying to  
3 flip the keys back to an insider for a low valuation, is just  
4 not supported by the record whatsoever.

5 And I think that's a good segue to 363(m), because I  
6 think that's very important to the structure of the sale here.  
7 And it's very important to TTAM, as it should be. And I think  
8 363(m) is important. We have two 363 sale -- two 363 sales  
9 here. We have: step 1, sale to NewCo; step 2, sale of NewCo  
10 equity to TTAM.

11 I believe the gentleman from California was  
12 questioning whether -- I believe I was following him  
13 correctly -- that because NewCo is not providing cash to the  
14 debtors, it is somehow knocked out of 363(m). I read 363(m).  
15 I believe it speaks to value. It does not say cash. So let's  
16 talk about value. What is NewCo giving? It's giving a note  
17 equal to the -- it's giving a note and an amount sufficient to  
18 ensure that, as of the closing, the debtors receive the  
19 benefit of the purchase price. I'm happy to go into as much  
20 technical detail as you'd like, Your Honor, but -- and this is  
21 in the sale order -- that note will provide that it's due and  
22 payable upon a change of control, the debtors or the borrower.

23 Mr. Nadal seemed to spin some sort of fraudulent  
24 conveyance theory. I don't really want to spend any time on  
25 that, because I don't think there's really any substance to

Colloquy

1 it. But the reason why the purchase price is going directly  
2 to the debtors is it's a closing mechanic. Otherwise, TTAM  
3 would be acquiring an entity that immediately has an up to  
4 305-million-dollar loan due and payable back to the debtor.  
5 So you could pay a dollar for the stock and then repay the  
6 debt. It's just a function of closing.

7 And what other value is NewCo providing? It's  
8 facilitating a value-maximizing transaction that, if done on  
9 the timeline of a 363 sale, will, on a conservative estimate,  
10 save the debtors' estates approximately 20 million dollars in  
11 pro fees and OPEX, maybe higher. I think, to the -- NewCo is  
12 providing value to the estates. NewCo is owned and controlled  
13 by the debtors. The notion that an entity owned and  
14 controlled by the debtors could somehow be acting in bad faith  
15 with respect to the parent of itself, who controls it, is a  
16 new legal theory. But there's certainly value, and I think  
17 363(m) is satisfied.

18 On Mr. Nadal's arguments about GIPA, I think he  
19 characterized Wesco as interpreting the definition of  
20 affiliate in the context of a contract. I don't disagree with  
21 that, but the citation we provided was Judge Isgur, who has  
22 certainly been around the block and is a very well-reasoned  
23 and thorough judge, quoted that third party is uniformly used  
24 in legal texts to not mean affiliate. Third party is not an  
25 affiliate based on a regular read of the statute. California

Colloquy

1 statute does not define third party based on 363(b)(1)(B).  
2 Our position is it's California's burden to demonstrate that  
3 third party does not mean affiliate. I don't know how they  
4 read "third" out of third party in the interpretation of their  
5 statute. And we think they haven't met that burden, and so  
6 California GIPA does not apply.

7 Mr. Nadal spoke about we didn't market the equity  
8 toggle. Candidly, I'm not sure how you market an  
9 implementation structure. But just so the record is clear,  
10 the bidding procedures allowed people to bid how they so  
11 choose. And we got multiple forms of bids in connection with  
12 the bidding procedures. TTAM did that. Their May 19th APA  
13 had the concept of an equity toggle. It had the concept of a  
14 plan toggle, and that was before we saw any of the state's  
15 objections. It's an implementation methodology. I'm not  
16 entirely sure where he reads nefarious intent into this  
17 structure.

18 But I mean, the APAs, as I think I told Your Honor  
19 when we had the discussion about what would happen if opt-in  
20 consent were required for a particular state, I mean, the APAs  
21 required transfer of PII with opt-in consent. We repped to  
22 that under those agreements. So to find a way to ensure that  
23 we're satisfying the rep at closing, I don't understand how  
24 that could possibly be anything the debtors are doing in bad  
25 faith.

Colloquy

1 THE COURT: You said you said the APA says with opt-  
2 in consent. Do you mean without opt-in consent?

3 MR. HOPKINS: Without.

4 THE COURT: Okay. That's what I thought.

5 MR. HOPKINS: Sorry. Thank you for clarifying that.  
6 That's an important clarification, Your Honor.

7 I believe a few of the states have argued for a  
8 waiver of the fourteen-day stay, and I want to be upfront with  
9 Your Honor. Is this a transaction where, if your order is  
10 entered today, can we close on Monday? It's not. We're going  
11 to work with TTAM to close as fast as we can, because -- I  
12 think you've heard me say this a number of times -- it's a  
13 500,000-dollar-roughly-per-day toll on the estates. The  
14 longer we're in Chapter 11, the longer we're operating the  
15 business.

16 And we're going to move heaven and earth to get this  
17 transaction closed as quickly as possible, we hope within  
18 fourteen days. We actually have some optimism that, because  
19 this is now -- and I'm not even talking specifically about  
20 PII. I mean, the global acquired assets -- this is just a  
21 matter of corporate law. I think, because we're dropping  
22 things into an affiliate and then selling the equity, it may  
23 actually facilitate standing up a actual operating entity  
24 where we can close faster.

25 And so looking at the other factors that courts

Colloquy

1 consider on the cause analysis for waiver of a fourteen stay,  
2 for the fourteen-day stay, I think it's certainly at arm's  
3 length. I haven't seen many non-arm's-length negotiations  
4 result in litigation. This was very much arm's length. The  
5 special committee is very -- has been as independent as it  
6 gets throughout this entire process.

7 Courts think about notice. I think Ms. Milligan  
8 again questioned the robustness of the notice here. I think  
9 she made a comment, it's nice that the debtors didn't have to,  
10 but they provided notice to all their customers of the sale,  
11 anyway, and it's nice that TTAM's going to do it again, but it  
12 didn't really talk about genetic data. We're a genetic data  
13 testing company. If you receive a notice from 23andMe that  
14 says, we're selling our business to either Regeneron and TTAM,  
15 it's very difficult for me to understand how the consumer  
16 could not think that whatever 23andMe -- whatever interest we  
17 have in their data is not being sold as part of that sale.

18 And I would note that the TTAM notice, which is going  
19 out before closing, they've committed to actually provide  
20 customers instructions on how to delete their data in that  
21 notice, and to provide instructions on how, should they so  
22 choose, opt out of things like the research consent.

23 And then the other standard is no prejudice to  
24 creditors. This is not a transaction, thankfully, where we  
25 have jilted, bitter litigation, where someone has come in

Colloquy

1 after the final procedures order and said, I'm going to pay  
2 more, you should overrule the -- override the Court's order  
3 and take my higher and better deal.

4 THE COURT: Well, we don't have that anymore.

5 MR. HOPKINS: Yeah, once is enough. Although, it was  
6 good for the estates. No prejudice to creditors will result  
7 from a waiver of the fourteen-day stay; it's the opposite. If  
8 we can close as fast as possible, that's how we maximize value  
9 for our creditors, and that's what's good for creditors. And  
10 I think you've heard from every major creditor in the case  
11 that they support the sale. So we would submit that a waiver  
12 of the fourteen-day stay is appropriate.

13 And just so Your Honor is aware of coming  
14 attractions, I mean, I think, if the states do seek a stay  
15 pending appeal, we will certainly argue that it should be  
16 bonded for the full amount of the purchase price.

17 I think Mr. Nadal cited a lot of case law about, you  
18 know, narrowing preemption in various cases, and I mean, he  
19 obviously was well prepared for today. But I don't think --  
20 and this circles back to the first point I made about  
21 preemption. We are arguing a very narrow, specific form of  
22 conflict preemption. We are not saying that any sale that  
23 involves PII, full stop, you get to ignore all bankruptcy law,  
24 or I'm sorry, all applicable nonbankruptcy law. It's only  
25 nonbankruptcy law that purports to restrict the transfer of

Colloquy

1 PII.

2 So to give you a hypothetical, if I stood up here and  
3 said, I want to violate CFIUS, but because I'm selling a  
4 couple customers' emails and my policy says I can sell those  
5 emails, I get to violate CFIUS because of 363(b)(1)(B). We've  
6 been very careful that that is exactly not what we're doing  
7 here. If it's not -- the sale order is very clear that it's  
8 very much the opposite. The only thing that we're asking this  
9 court to potentially preempt -- we think we win if we get to  
10 363(b)(1)(B), but we don't think we should, or we don't think  
11 Congress requires it. It's very, very narrow. So cases that  
12 go broader and say -- like Shower, you can't alienate an  
13 interest in a farm co-op in contravention of state law. I  
14 don't think anything we're saying here changes the analysis on  
15 that.

16 Mr. Nadal spoke to the privacy policy in California  
17 GIPA. Unless Your Honor wants me to reiterate our arguments  
18 about why we think it works under those laws, I will just rest  
19 on our papers and our argument on that.

20 THE COURT: I think I'm okay there.

21 MR. HOPKINS: Okay. Thank you, Your Honor. Let's  
22 see here.

23 Texas, the property right issue, I think we've been  
24 clear, and I'm happy to try to further clarify. Whatever  
25 interest in their genetic data that Texas law provides a



Colloquy

1 consumer, I don't think Texas law makes 23andMe's business  
2 illegal as a matter of law. So a customer can make a decision  
3 to sign up for 23andMe. We think that if they do that, they  
4 are required to consent, as a predicate step, to our terms of  
5 Service and privacy policies. Whatever rights we have in the  
6 data arise, among other things, under those documents that  
7 customers freely consented to.

8 We are not seeking to -- again, I think, at the risk  
9 of repeating myself, Your Honor, because it seems to be a very  
10 important objection to the State of Texas, I want to be clear.  
11 We are not changing -- if there's a collective bundle of  
12 sticks here, and the customer has some -- owns the bundle, and  
13 they've given 23andMe a stick, we're not taking two sticks.  
14 We're just keeping the stick we have, and that's all we're  
15 selling. We're selling our interest in the property that the  
16 customer voluntarily, consensually granted to us under the  
17 privacy policies. We're transferring it to TTAM. We're  
18 respecting the customer's rights under those policies through  
19 that process. Arguably, we're giving half the stick back  
20 because TTAM is giving privacy enhancements to the customers  
21 that they may not have had before.

22 I understand Ms. Milligan's point that at least some  
23 of the things TTAM is agreeing to is already required under  
24 state law. But we're being clear in the sale order that the  
25 only 363(f) relief we're seeking with respect to customers is

Colloquy

1 monetary claims that arise prior to the closing.

2 THE COURT: So as I understood Ms. Milligan's  
3 argument on this point, it's that the bundle of sticks in  
4 Texas, maybe a loan in Texas, is divided such that 23andMe  
5 gets some of the sticks. But one of the sticks retained by  
6 the customer is alienation of the entire property, whatever  
7 else it is. And so I mean, I had some questions of, why do we  
8 have the transfer restrictions, then, in 006 if that's what  
9 003 means, that the property interest is defined in an  
10 unconventional way.

11 MR. HOPKINS: I think that's right, Your Honor. I  
12 think, if you wanted to read Texas GIPA consistently with all  
13 the provisions of the statute, I think what that enshrines is  
14 a customer's right to delete. I think there's certain -- to  
15 say, I gave you something, I want it back, and you can never  
16 take my right to take it back away from me, I think there  
17 is -- I mean, obviously we confronted it in our main argument.  
18 There are restrictions on transfers or disclosures to a  
19 person. I think we talked about why we think that doesn't  
20 apply here. I'm not arguing that state law doesn't give them  
21 that right. We're just arguing that even if Your Honor gets  
22 to state law, it's not applicable to our sale, for all the  
23 statutory construction reasons we mentioned.

24 I don't think Ms. Milligan -- I mean, we are not  
25 advocating, Your Honor take a hyper-technical read of the

Colloquy

1 statutes. I think that's clear from our argument. That does  
2 appear to be the position of the State of Texas. And I don't  
3 think they ever actually grappled with our argument that, on a  
4 strict construction of their statute, NewCo is not even a  
5 person. That wholly pulls it out of the transfer disclosure  
6 restrictions under the statute.

7 Texas also agreed that the plan works. They talked  
8 about de-identified versus identified data. I mean, I can  
9 explain to Your Honor, if helpful, why that's commercially  
10 important. But I don't think it goes to the merits of the  
11 law, so I don't --

12 THE COURT: Yeah, I think we can move on.

13 MR. HOPKINS: Okay. I'm just going through my notes  
14 here to make sure I don't -- I think I already addressed her  
15 points about notice. Moving quickly, I'd like to touch on  
16 that briefly, because I think due process and notice is  
17 important here.

18 Your Honor has obviously been a bankruptcy  
19 practitioner for many years, and now a bankruptcy judge. I'm  
20 sure you've seen many, many 363 sales. I would submit that  
21 the fact that there was a month between everyone getting  
22 notice of who the two potential bidders are, the terms of  
23 their APAs -- which, with TTAM, did include an equity toggle  
24 and a plan toggle; it included the definition of acquired  
25 assets, included, the definition of assumed liabilities -- is

Colloquy

1 actually a pretty significant period of time in large Chapter  
2 11 cases.

3 And I think Mr. Swift's declaration that was entered  
4 into evidence yesterday has a footnote to that effect where  
5 it's usually maybe a week, ten days, where you have the  
6 auction and you're at the sale hearing. That obviously didn't  
7 happen here. And so I think the notice is -- I just don't  
8 believe it's an issue on this record.

9 And the suggestion that we somehow tried to hide the  
10 ball, we've worked constructively with the states all along  
11 the way. I think settling twenty-five objections between the  
12 10th and today kind of demonstrates, at least in some  
13 respects, our commitment to working collaboratively with them.  
14 We agreed to the appointment of the CPO. We didn't have to.  
15 We could have litigated that issue. We think we're right on  
16 the law. That was a significant cost and expense to the  
17 estate. We've always tried to maintain open lines of  
18 communications with the states and bring them along in the  
19 process. And so I just -- I don't think this is a situation  
20 where Your Honor should have concerns about approving the sale  
21 based on notice or due process.

22 They've pointed to -- I believe Ms. Milligan alluded  
23 to statements from the debtor's CEO, Joe Selsavage, made in  
24 congressional testimony. I don't think I've seen any law from  
25 the states that says you look outside the four corners of the

Colloquy

1 terms, the privacy policies, and those specific legal  
2 documents that are incorporated therein. But certainly, I  
3 wouldn't expect that a statement made by a CEO of a company at  
4 a congressional hearing is somehow incorporated into an  
5 agreement with all of the company's customers.

6 On the insider point, I think I've already addressed  
7 that.

8 With Tennessee and Kentucky, I think the point I  
9 would make, Your Honor, is I heard them argue their  
10 interpretation of GIPA. What I didn't hear them argue is  
11 anything in response to the statutory -- the rule of statutory  
12 construction that you don't read statutes to create absurd  
13 results. They tell you, person means this list of things,  
14 ipso facto, any transfer to a person must be prohibited unless  
15 you go get opt-in consent. But I didn't hear any argument as  
16 to how you read the statute that way.

17 And then my favorite example on this is Mr.  
18 Lefkowitz. He's the chief privacy officer. That's obviously  
19 a very important function of the senior management team of a  
20 direct-to-consumer genetics testing company. In that role, at  
21 least Mr. Lefkowitz -- I can't speak to all direct to consumer  
22 genetic testing companies -- he often interfaces with the  
23 customer care team to try to resolve customer concerns. You  
24 heard him testify today about deletions and people having  
25 issues with deletions. He's involved in that type of work.

Colloquy

1 That means he has access to the data. If he decides to enjoy  
2 early retirement, what do the debtors do?

3 We can't replace that individual until we get  
4 affirmative opt-in consent from every single customer and  
5 every single objecting state, or we have to delete all of  
6 their data. And how is that better for consumers? How could  
7 that be the answer that -- the legislatures enacted a statute  
8 that says, you can't replace a key privacy officer of a  
9 company that has all of this -- you've heard it from the  
10 states -- immutable, unique, irreplaceable data for months,  
11 years?

12 You heard Professor Cate talk about how long the  
13 affirmative opt-in consent process could take. I mean, I  
14 don't typically like standing in front of a bankruptcy court  
15 and arguing policy when we're talking about statutory  
16 interpretation. But I just think this read of the statute is  
17 so dogmatic that it just misses the entire purpose of what the  
18 statutes are intended to prevent, just to seek to block a sale  
19 that they all admit could be done under a plan in two months'  
20 time at twenty million dollars of additional expense, to the  
21 detriment of our stakeholders, many of whom are customers of  
22 the company. I mean, it just --to some extent, it defies  
23 logic.

24 Mr. Hunt from Kentucky, he made a lot of comments  
25 about, is it really that big of a burden, opt-in consent. I

Colloquy

1 don't think Mr. Hunt had any evidence. I think the evidence  
2 in the record in this sale is that it is a burden. I don't  
3 think even the CPO, Professor Richards, disputes it's a  
4 burden. He just says it's better based on the universe of  
5 academic literature. But I think the record here is that  
6 affirmative opt-in consent is very expensive. It's very  
7 ineffective.

8 And I think my last point, Your Honor -- and then I'd  
9 just like to confer with Mr. Clareman for one second.

10 THE COURT: Of course, yeah.

11 MR. HOPKINS: I just want to confirm that I think you  
12 have it on the nose about the gentleman from Utah's argument  
13 about how this is somehow a fundamental shift in what 23andMe  
14 is going to do post-acquisition. I think the testimony in the  
15 record from Ms. Wojcicki is clear, as is the understanding  
16 based on the transaction documents actually laid out in the  
17 APA.

18 So if you'll just give me ten seconds.

19 THE COURT: Please do, yes.

20 (Counsel confer)

21 MR. HOPKINS: Your Honor, no further argument unless  
22 you have questions for me. You've heard me tell you a few  
23 times the Supreme Court instructs that you look to both the  
24 text and structure of a congressional statute for preemption.

25 THE COURT: Right, right. Yeah.

Colloquy

1 MR. HOPKINS: I do have the case. I do have the  
2 cite. I don't believe I actually read it into the record.

3 THE COURT: Just give me the cite, if you would.

4 MR. HOPKINS: It's 139 S. Court 1894.

5 THE COURT: And which case is that?

6 MR. HOPKINS: That is Virginia Uranium, Inc. v.  
7 Warren Uranium.

8 THE COURT: Uranium. Okay.

9 MR. HOPKINS: And I believe we have copies, if it  
10 would be helpful.

11 THE COURT: Oh, that's okay. Don't worry about that.

12 MR. HOPKINS: Okay. With that, unless there's  
13 anything further from TTAM or Your Honor has any other  
14 questions for me, I think I'll cede the podium.

15 THE COURT: I don't have any other questions for you.  
16 We're good there. Okay. All right.

17 I'm going to take this under advisement. It's a  
18 little more than I can wrangle, particularly at 7 o'clock on a  
19 Friday night to rule from the bench. I.

20 MR. HOPKINS: I understand there's a Cardinals game  
21 tonight.

22 THE COURT: I didn't even know that, to be honest.  
23 Those of you who missed your flight might want to check it  
24 out. It's within walking distance.

25 MR. HOPKINS: Our hotel is right across the street,



Colloquy

1 so we probably will.

2 THE COURT: Yeah, there you go. There you go.

3 All right, so let me thank all counsel and witnesses,  
4 but counsel in particular for your zealous advocacy and for  
5 squeezing this in this week. We had a little complication  
6 with the holiday there. And some of you may not be getting  
7 home until tomorrow, but I think it's preferable to rolling  
8 this into next week.

9 I understand the urgency here. I will rule as  
10 quickly as I reasonably can, while still being thorough and  
11 making sure I catch everything in the record and dispose of  
12 all the arguments that the parties have made. But like I  
13 said, I know I need to do it quickly, and I will absolutely  
14 keep that in mind.

15 MR. HOPKINS: Well, thank you very much, Your Honor.  
16 And on behalf of the debtors -- and I'm sure I speak for many  
17 of the other advisors in the room -- thank you and your staff  
18 for staying this late on a Friday and for how prepared the  
19 Court was for today. It was really phenomenal, so thank you.

20 THE COURT: Certainly.

21 And let me thank our security officers, who are way  
22 over time. Thank you very much for sticking around with us.  
23 We really appreciate it, and of course, the court staff here,  
24 as well.

25 So with that, court will be adjourned.

Colloquy

1 Yes, Mr. Adams.

2 MR. ADAMS: Jason Adams, Kelley Drye committee.

3 Quick housekeeping.

4 THE COURT: Yes.

5 MR. ADAMS: There's an equity committee appointment  
6 motion on the calendar for, I believe, next Tuesday. I'm only  
7 rising to tell you that I think peace has broken out.

8 THE COURT: Okay.

9 MR. ADAMS: So I believe that we will be advising  
10 Your Honor's chambers in, hopefully -- well, it's not going to  
11 be today because we're -- Friday.

12 THE COURT: Not today. Don't do it today.

13 MR. ADAMS: By Monday morning. Monday morning, I  
14 believe that we will have peace in the valley on that. So for  
15 the benefit of Your Honor's chambers, I just wanted to let  
16 that know so that nobody was preparing for that. I think,  
17 hopefully --

18 THE COURT: I can devote more of my time to this  
19 ruling. Very good.

20 MR. ADAMS: Thank you, Your Honor.

21 MR. HOPKINS: Thank you very much, Your Honor.

22 THE COURT: All right. Thank you. We'll be  
23 adjourned.

24 MR. HOPKINS: Appreciate it.

25 THE COURT: Are we off the record?

Colloquy

1 THE CLERK: Yes, Judge.

2 (Whereupon these proceedings were concluded at 7:09 p.m.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1	I N D E X				
2					VOIR
3	WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS DIRE
3	FOR THE DEBTORS:				
4	Fred Cate	14	51,76,102	114	41,118,119
5			110		
6	Peter Lefkowitz		122,148,161		
7	FOR THE STATE OF				
7	TEXAS:				
8	Neil Richards	174	185,188,205	218	
9	EXHIBITS:				
10	No. Description		Marked	Admitted	
10	STATE OF TEXAS':				
11	A-18 2/28/2013 privacy policy			97	
12	D J. Selsavage statement	170		171	
13	E Statement of Selsavage	171		171	
14	346 Joint stipulation	171		172	
15	718 Consumer privacy ombudsman report	172		173	
16	DEBTORS':				
17	Jami Mills Vibbert's declaration			121	
18	7, 7A, 7B Notice of winning bidder			121	
19	STATE OF CALIFORNIA'S:				
20	CA-2 "Your privacy comes first" page			133	
21	CA-1 23andMe blog post about the passage of California genetic testing			136	
22	CA-4 March 31, 2022 Form 10-K			147	
23	RULINGS:				
24	Prof. Cate is accepted as an expert Witness			PAGE 50	LINE 25
25	Matter taken under advisement			391	19

C E R T I F I C A T I O N

I, Joseph Burstein, the court-approved transcriber,  
do hereby certify the foregoing is a true and correct  
transcript from the official electronic sound recording of the  
proceedings in the above-entitled matter.

  
JOSEPH BURSTEIN (CDLT-189)

June 24, 2025

DATE \_\_\_\_\_

TTA-Certified Digital Legal Transcriber